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Supreme Court, U.S.
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No. 94-___

In The

Supreme Court of the United States

October Term, 1994

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DAVID R. HODGE, MARSHA A. HODGE,
and JOSEPH E. HODGE,

Petitioners,

v.

M. ALEXANDER JONES, ALAN L. KATZ,
and CAROLYN W. COLVIN,

Respondents.

◆

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

◆

PETITION FOR A WRIT OF CERTIORARI *and* APPENDIX

◆

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QUESTIONS PRESENTED FOR REVIEW

After a doctor misdiagnosed infant Joseph Hodge's bone infection as "suspected child abuse", the Carroll County (Maryland) Department of Social Services "ruled out" physical child abuse, but maintained a hard-copy file on the case and computer-listings on its Automated Master File ("AMF"). Respondent State officials then repeatedly denied petitioners David and Marsha Hodge (parents of Joseph) access to the file and the AMF data, assuring them that: (i) they were exonerated of child abuse; and (ii) they were not entitled to a hearing under Maryland Code, Family Law § 5-715, because the AMF is supposedly not a "central registry" and they (the Hodges) were supposedly not "suspects". For nearly three years, however, the AMF secretly listed the case as "indicated" for sexual child abuse. Moreover, respondents knew that the AMF is a "central registry" and did treat the adult Hodges as "suspects", but denied those facts as part of an illegal policy aimed at defeating the rights of the Hodges (and thousands of others) to a § 5-715 hearing. Under these circumstances,

I. Did respondents' conduct in maintaining false AMF listings of "indicated" sexual abuse, denying a § 5-715 hearing, and misrepresenting the facts so shock the conscience and offend the community's sense of fair play and decency as to violate the Hodges' rights of substantive due process?

QUESTIONS PRESENTED FOR REVIEW – Continued

II. Did respondents' maintenance of a file and AMF listings on a case with no evidence of any child abuse, and secret maintenance of false AMF listings of "indicated" sexual abuse, abridge the Hodges' rights of familial privacy?

III. Did respondents' illegal policy of falsely denying that the AMF is a "central registry" and that the Hodges (and others) are "suspects", so as to evade the adjudicatory procedure mandated by § 5-715, deprive the adult Hodges of due process of law under *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982)?

IV. Do respondents have qualified immunity from liability for damages under 42 U.S.C. § 1983, where they lacked discretionary authority under Maryland law to engage in any of the actions described above, and where those actions:

A. violated the Hodges' rights to substantive due process;

B. abridged the Hodges' rights of familial privacy; and

C. deprived the adult Hodges of due process of law under *Logan* v. *Zimmerman Brush Co.*?

V. Are the Hodges' claims for declaratory and injunctive relief moot, where:

A. respondents maintained false AMF listings of "indicated" sexual child abuse on the Hodges for almost three years;

QUESTIONS PRESENTED FOR REVIEW – Continued

B. respondents claim the right under Maryland law to keep AMF listings "confidential" from the Hodges;

C. the Court of Appeals erroneously ruled that maintenance of false AMF listings is not actionable under 42 U.S.C. § 1983; and

D. nothing prevents respondents from secretly maintaining whatever false AMF listings they want on the Hodges?

VI. Are the Hodges entitled to expunction of the case-files and AMF listings because of respondents' wrongdoing?

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties in the United States Court of Appeals for the Fourth Circuit included David R. Hodge, Marsha A. Hodge, and Joseph E. Hodge (plaintiffs-appellees below, petitioners here); and M. Alexander Jones, Alan L. Katz, and Carolyn W. Colvin (defendants-appellants below, respondents here).

The caption of the case in the Court of Appeals also listed the Carroll County Department of Social Services as a "defendant". The latter had been dismissed from the action in the District Court, however. *See* the Appendix hereto ("App.") at 29a, 60a.

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TABLE OF ABBREVIATIONS

"Aff ALK-2" –	Second Affidavit of Alan L. Katz (Docket Entry No. 42)
"Aff AMB" –	Affidavit of Alan Matthew Brock (Docket Entry No. 46)
"Aff CB" –	Affidavit of Charles Bosley (Docket Entry No. 11)
"Aff DRH-1" –	First Affidavit of David R. Hodge (Docket Entry No. 11)
"Aff DRH-2" –	Second Affidavit of David R. Hodge (Docket Entry No. 11)
"Aff DRH-9" –	Ninth Affidavit of David R. Hodge (Docket Entry No. 48)
"Aff ERB-2" –	Second Affidavit of Elliott R. Burgher (Docket Entry No. 11)
"AMF" –	Automated Master File
"CCDSS" –	Carroll County (Maryland) Department of Social Services
"COMAR" –	Code of Maryland Regulations
"Ex" –	Exhibit to an affidavit (*e.g.*, Aff DRH-1, Ex C)
"MDHR" –	Maryland Department of Human Resources

PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Pursuant to Rules 12 through 14 of the Rules of this Court, the Hodges petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

DECISIONS BELOW

The Court of Appeals' decision is reported at ___ F.3d ___, and appears in App. at 1a. The District Court's decision is reported at 812 F. Supp. 593, and appears in App. at 27a. The District Court's decision on motions to alter or amend its judgment is unreported, and appears in App. at 65a.

JURISDICTION

The Court of Appeals entered its judgment on 19 July 1994. This petition is timely under Rule 13.1 of the Rules of this Court. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States; Title 42, United States Code, § 1983; and Maryland Code, Family Law § 5-715. The text of these and other relevant provisions of law appears in App. at 82a.

STATEMENT OF THE CASE

I. The operative facts. When on 20 January 1989 David and Marsha Hodge took their infant son Joseph to the hospital for treatment of a bone infection, a doctor erroneously reported suspected child abuse to the Carroll County (Maryland) Department of Social Services

("CCDSS").[1] The next day, a CCDSS worker found no evidence of abuse. The Hodges then asked CCDSS to close the case as "ruled out".[2]

When David Hodge requested "a complete copy of any file" on the incident, respondent Alan Katz, Assistant Director of CCDSS, answered that the "report reflects that * * * abuse was ruled out and unsubstantiated", but supplied only a redacted copy of one CCDSS form.[3] Hodge again requested "the full report", asking if the Hodges had been "listed on any * * * registry", and emphasizing their "eager[ness] to have our names removed from any registry", because the case involved only a doctor's mistake. Katz feigned an inability "to give [Hodge] the full report because [he was] charged by State Regulations to protect the identity of reporters".[4] In fact, Katz could have released the file, as the Hodges knew the "reporter's" identity.[5] Katz also dissembled that the Hodges' "names were not entered into the Central Registry for Child Abuse nor shall they be", but "are on our

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[1] "Child abuse" is defined in Maryland Code, Family Law § 5-701(b), and Code of Maryland Regulations ("COMAR") 07.02.07.02B(3), *in* App. at 85a, 92a.

[2] *See* Freed v. Worcester Cty. DSS, 69 Md. App. 447, 452 n.8, 518 A.2d 159, 161 n.8 (1986) ("ruled out" means "there is no evidence that the child has been * * * harmed").

[3] Aff DRH-1, Exs A and B. [The voluminous record-materials not included in the Appendix are defined in the TABLE OF ABBREVIATIONS, *ante*, at xiv.] On the apparent two rulings, *see* App. at 4a n.1.

[4] Aff DRH-1, Exs C and D. "Reporters" are the persons who report suspected child abuse. *See* Maryland Code, Family Law, §§ 5-704, 5-705; COMAR 07.02.07.04.

[5] Maryland Code art. 88A, § 6(b)(4, 6); COMAR 07.02.07.18A(4, 6), *in* App. at 89a-90a, 95a-96a. *See* State v. Runge, 317 Md. 613, 620-21, 566 A.2d 88, 91 (1989).

Automated Master File as required by State procedure". In fact, Katz knew both that: (i) the computerized Automated Master File ("AMF") employed by the Maryland Department of Human Resources ("MDHR") and its local Departments of Social Services is a "central registry" under MDHR regulations;[6] and (ii) Maryland Code, Family Law § 5-715 required CCDSS to give the Hodges notice and hearing before entering their names into a "central registry" as "suspects" of child abuse.[7] Morever, *Katz knew how the AMF listed the case – and why he had to conceal that information from the Hodges.*

Thereafter, David Hodge (and others acting on his behalf) made numerous requests to Katz and respondent Carolyn Colvin, Secretary of MDHR, for information, for a § 5-715 hearing, and to expunge the case. Hiding behind Maryland's confidentiality statute,[8] Katz and Colvin refused to divulge the information, denied that the AMF is a "central registry" and that the Hodges were "suspects", refused to provide them with the notice and hearing § 5-715 required, and refused to expunge the case.[9] Instead, they misled the Hodges:

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[6] "Central registry" is defined in COMAR 07.02.07.02B(1), *in* App. at 92a. The duplicitous history of the "central registry" is recounted in Aff CB, ¶¶ 8-18. *See* App. at 34a & n.3.

[7] App. at 83a-84a. Section 5-715 was amended in 1993 by substituting "a central registry" for "the central registry" throughout. *See* Maryland Code, Family Law § 5-715 (1993 Cum. Supp.).

[8] Maryland Code art. 88A, § 6(b). *See* App. at 15a-16a, 89a-90a.

[9] The Court of Appeals says that, because an "unsubstantiated" report of child abuse was required to be expunged from the hardcopy case-file after five years, the Hodges' "investigation report * * * would have been expunged in January 1994". App. at 5a n.3, *citing* Maryland Code, Family Law

- *Colvin:* "[The Hodges'] names appear on the master file as the parents of a child served and are not indicated in this master file system as an alleged perpetrator of abuse. In fact, Maryland does not have any master file system which identifies perpetrators of abuse.

" * * * [I]n this case * * * there is a very clear record which exonerates the parents."

- *Colvin:* "[MDHR] has not maintained a * * * central registry since July 1, 1988. * * *

" * * * [David Hodge's] name is in th[e AMF] system, not as a 'known child abuser,' but as someone who has received services. [David Hodge is] not identified in this system as an abuser and this is not the central registry referred to in § 5-714. Therefore, the inclusion of [David Hodge's] name in this system is not appealable and the hearing process does not apply. * * * [T]he information concerning the * * * investigation would indicate in [David Hodge's] case that child abuse was unsubstantiated."

- *Katz:* "[N]ames of suspected abusers have not been entered into the Central Registry since sometime prior to 1987. * * *

" * * * Nowhere in th[e AMF] is anyone identified as an abuser or suspected abuser."

- *Colvin:* "[T]here is no identification of [David Hodge] as a child abuser, known, unsubstantiated, suspected or otherwise in any files maintained * * * by [MDHR]."[10]

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§ 5-707(b), *in* App. at 86a-87a. However, even had the report been "unsubstantiated", data on the case would remain on *the AMF* (a "central registry") until at least January of *1996*. Maryland Code, Family Law § 5-715(e), *in* App. at 84a. Moreover, until shortly after they filed their federal complaint in January of 1992, the Hodges' case was listed on the AMF as one of *"indicated"* abuse – and therefore would *never* have been expunged, under MDHR policy. *See* Aff CB, Ex G, p. 7.

Disbelieving these assertions, in 1991 the Hodges filed suit in State court, naming as defendants CCDSS, Katz, Colvin, and respondent M. Alexander Jones, Director of CCDSS.[11] After dismissing that suit without prejudice, on 17 January 1992 the Hodges filed the instant civil-rights action under 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3),[12] alleging (among other things) that

- respondents' actions prevented the Hodges from determining whether the AMF contained "knowingly *falsified*" information; and

- respondents were falsely denying that the AMF is a "central registry", in order "to prevent embarrassing revelations of * * * *falsified* or otherwise untrue statements * * * in reports of alleged child abuse".[13]

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[10] Aff DRH-1, Ex E, p. 2; *id.*, Ex I, pp. 1, 2; *id.*, Ex J, pp. 1, 2; *id.*, Ex V, p. 2.

[11] Hodge v. Carroll County DSS, Civil No. 10576 (Cir. Ct. Carroll Cty., Maryland).

[12] The Hodges also named CCDSS as a defendant; but their claims against the agency were dismissed. App. at 29a, 60a.

[13] Complaint (Docket Entry No. 1) ¶¶ 45(a), 44(a) (emphasis supplied). The Hodges emphasize their allegations concerning *falsified* AMF entries, because the Court of Appeals suggested that they failed to amend their complaint to allege a particular "inaccuracy" in the AMF (described below) which they discovered in the District Court, and which they argued in the Court of Appeals (and argue here) supports the District Court's judgment. App. at 14a-15a n.9. *See* Brief for Appellees, *Hodge* v. *Jones*, No. 93-1182 (4th Cir.), at 14-21. No rule of federal procedure, however, requires amendment of a complaint to list specific evidence coming within some general category already alleged in the complaint, in order to preserve claims based on that category as to specific pieces of evidence. [cont'd]

The Hodges claimed that respondents' maintenance of the file and AMF listings, denials of information, and refusals to provide a § 5-715 hearing deprived them of due process. In addition to seeking other relief, they prayed that the file and AMF listings be disclosed and then expunged.[14]

When respondents finally disgorged the file and AMF listings on 17 July 1992 in compliance with an order of the District Court,[15] shocking evidence came to light:

Moreover, the Hodges *did* raise the "inaccuracy" in the District Court. *See* Plaintiffs' Analysis of the Hodges' Department of Social Services Case-File and of the Affidavit of Alan L. Katz (Docket Entry No. 40); Plaintiffs' Memorandum of Points and Authorities in Reply to Defendants' Opposition to Plaintiffs' Motion for Interlocutory Summary Judgment on the Issue of Defendants' Liability with Respect to Denial of Procedural Due Process (Docket Entry No. 41) *passim*; Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion to Strike Plaintiffs' Analysis of the Hodges' Department of Social Services Case-File and of the Affidavit of Alan L. Katz (Docket Entry No. 48). And the District Court explicitly ruled on the evidence, albeit incorrectly. App. at 46a-47a n.5, *acknowledged by the Court of Appeals, id.* at 14a-15a n.9. Therefore, the complaint must be "treated in all respects as if [the 'inaccuracy'] had been raised [therein]". Fed. R. Civ. P. 15(b).

In any event, on appeal the Hodges may support the District Court's judgment with "any matter appearing in the record", and may assert any ground, "whether or not that ground was relied upon or even considered by the trial court". United States v. American Railway Express Co., 265 U.S. 425, 435 (1924); Dandridge v. Williams, 397 U.S. 471, 475 n.5 (1970). Implicitly recognizing this, the Court of Appeals itself ruled on the "inaccuracy", albeit erroneously. App. at 13a-14a n.8, 14a-15a n.9, 19a-20a n.10.

[14] Complaint (Docket Entry No. 1), Prayer for Relief §§ III (a, b), V.

[15] *See* Docket Entries Nos. 24, 33.

(a) A form used to input data into the AMF dated 23 January 1989[16] codes the Hodges' case as a child *sexual*-abuse investigation in which abuse was *"indicated"* (that is, *found to have occurred*).[17]

(b) An AMF printout dated 03 May 1990[18] shows that, while respondents were pretending that physical child abuse had been "unsubstantiated" and "ruled out" and that the Hodges had been exonerated, the AMF actually listed the case as a *sexual*-abuse investigation closed as *"indicated"* on 23 January 1989.

(c) Finally, an AMF printout dated 14 July 1992[19] lists the case as a *physical*-abuse investigation closed as *"unsubstantiated"* on 23 January 1989. However, the printout also discloses that some data were changed on 21 January 1992, *four days after the Hodges filed their federal complaint*. Although Katz later claimed these changes were "made * * * in the normal course of business", on or about 20 January 1992 he and Jones were aware of the filing of the complaint.[20]

In sum – On 21 January 1992 the AMF was changed to show an *"unsubstantiated"*, not an *"indicated"*, case of *physical*, not *sexual*, abuse. But *for almost there years prior thereto, the Hodges were, and absent their filing of the federal complaint would* ***permanently*** *have been, listed as "indicated"* ***sexual*** *abusers of their own son*. Moreover, respondents knew the true state of the false AMF listings. For example, when the Hodges sued in State court, a county attorney sent the Hodges' CCDSS file to the Maryland Attorney General's office, which was representing Jones.[21] When respondents produced this file in the District Court, it contained the AMF printout dated 03 May 1990, showing "indicated" sexual abuse. And respondents never denied that they knew or should have known of the false listings at all material times prior to 21 January 1992.

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[16] Aff DRH-9, Ex E.

[17] "Sexual abuse" is defined in Maryland Code, Family Law § 5-701(p), *in* App. at 85a. "Indicated" is defined in COMAR 07.02.07.08B, *in* App. at 93a-94a.

[18] Aff DRH-9, Ex C.

[19] *Id.*, Ex A.

[20] *Compare* Aff ALK-2, at 3, *with* Aff AMB.

II. The decision of the District Court. On the Hodges' motion for interlocutory summary judgment, and respondents' motion to dismiss or for summary judgment, the District Court determined that there was no genuine issue of material fact that:

- The AMF is a "central registry". "[R]egulations define 'central registry' as 'a registry of all reported cases of suspected child abuse and neglect' ". "[T]he AMF certainly includes * * * 'all reported cases of suspected child abuse' " which "are distinguished on the AMF * * * by alphanumeric codes". Respondents "submitted no * * * admissible evidence * * * that the AMF is *not* a central registry".[22]

- Notwithstanding their innocence, the Hodges were treated as "suspects" on the AMF. "[N]o reasonable jury could conclude that the AMF does not list the names of suspected child abusers."[23]

- AMF data is widely disseminated within the government.[24]

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[21] Letter of 15 March 1991 from Brian Bowersox to Cathy A. Dryden, in the Hodges' CCDSS case-file (Docket Entry No. 33).

[22] App. at 47a, 62a.

[23] *Id.* at 62a-63a, 50a-51a, 72a-75a.

[24] *Id.* at 31a-32a. The list of persons authorized to see AMF data is long indeed, even under Maryland law. *See* Maryland Code, Family Law § 5-714(c); *id.*, art. 88A, § 6(b)(2-3, 5); COMAR 07.02.07.18A, *in* App. at 83a, 89a-90a, 95a-96a. Under federal law, the very provision the Court of Appeals cites that requires "confidentiality" as a condition of MDHR's federal funding also

- "[N]o legitimate state interest supported maintaining the Hodges' case file after the true nature of Joseph's condition was discovered". Respondents "failed * * * to raise any genuine issue of material fact in connection with that issue."[25] And,

- Respondents denied the Hodges (and thousands of other people) notice and hearing under color of "an established state procedure that refuses to recognize the AMF as a central registry or to accord to persons suspected of child abuse the procedural safeguards contained in § 5-715".[26]

On these facts, the District Court ruled that:

- Listing the Hodges' case on the AMF abridged their right to privacy. The "protected liberty interest in familial privacy encompasses an 'interest in avoiding disclosure of personal matters' " which "is implicated- * * * when government collects private information in the absence of any legitimate state interest for such collection". "[T]he deprivation of familial privacy" occurred "when [respondents] maintained the Hodges' case file as

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mandates that "[the Department of Health and Human Services] and the Comptroller General of the United States or any of their representatives shall have access to records", including "all * * * programmatic records, supporting documents, * * * and other records" "[r]equired to be maintained" or "[o]therwise reasonably considered as pertinent to an HHS grant". And these "rights of access * * * shall last as long as the records are retained". *Compare* App. at 6a & n.4 *with* 45 C.F.R. §§ 1340.14(i)(5), 74.20(a), § 74.24(d); *and see* 45 C.F.R. § 74.24(a). And the record shows "leaks" to unauthorized persons in the Hodges' case. Aff DRH-2; Aff ERB-2. *See also* Aff CB, ¶¶ 33-38.

[25] App. at 61a-62a. *Accord, id.* at 43a, 67a-71a.

[26] *Id.* at 52a.

part of the AMF even after any reasonable suspicion of child abuse had been ruled out".[27]

- Respondents' illegal "established state procedure" deprived the Hodges of a protected "liberty" interest.[28]
- Respondents lacked qualified immunity, because in January of 1989 the Hodges' right to privacy was clearly established, as "were the procedural safeguards * * * in § 5-715 and its supporting regulations".[29] But,
- As to the false entries of "indicated" sexual abuse, "the state of the information on the AMF relates more to a common law claim for defamation than a constitutional claim for deprivation of liberty and property without due process of law".[30]

The District Court granted the Hodges interlocutory summary judgment, holding *inter alia* that they were entitled to expungement of all CCDSS records.[31]

III. The decision of the Court of Appeals. The Court of Appeals reversed and remanded for entry of judgment in favor of respondents.

A. The Court of Appeals dismissed as "melodrama" that for nearly three years – while respondents falsely told the Hodges they had been exonerated, and until the Hodges filed their federal complaint – the AMF secretly listed the case as "indicated" sexual abuse. Respondents' conduct, the court opined, did not violate the "residual protections of 'substantive due process' ", because it was not

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[27] *Id.* at 40a-41a, *quoting* Whalen v. Roe, 429 U.S. 589, 599 (1977).

[28] App. at 51a-52a, *applying* Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982).

[29] App. at 58a-59a. *Accord, id.* at 75a-76a.

[30] *Id.* at 46a-47a n.5.

[31] *Id.* at 60a-63a, 56a-57a.

> "so arbitrary or irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies." * * * [Respondents'] conduct neither "shocks the conscience" nor "offends the community's sense of fair play and decency" because they did nothing more than "offend some fastidious squeamishness or private sentimentalism."[32]

Thus, the court ruled, "that the records * * * erroneously identified the Hodges as child abusers for some period of time * * * is not actionable under § 1983".[33]

B. The Court of Appeals denied that respondents had abridged the Hodges' rights of familial privacy, because the Hodges had supposedly "fail[ed] to demonstrate that [respondents'] actions were designed to have, have had, or even will have a significant impact on the parent-child relationship".[34] The court denied that "the

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[32] *Id.* at 14a-15a n.9, 19a-20a n.10. The court identified no "pre-deprivation procedural protections" available to the Hodges. Neither could it have – as the District Court found that respondents knowingly abjured their duties under § 5-715; and even the Court of Appeals assumed *arguendo* that they "may have violated" that provision. *Id.* at 51a-52a, 23a, 6a & n.4. Nor did the court acknowledge that substantive due process bars arbitrary governmental actions "regardless of the fairness of the procedures used to implement them". Daniels v. Williams, 474 U.S. 327, 331 (1986). And the court's reference to possible " 'post-deprivation state remedies' " was irrelevant – as "[a] plaintiff * * * may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of [his substantive] rights". Zinermon v. Burch, 494 U.S. 113, 125 (1990).

[33] App. at 14a n.8.

[34] *Id.* at 13a.

State lacks a legitimate governmental interest [in maintaining records] once an abuse report has been deemed 'unsubstantiated' or 'ruled out' ", but did not explain how any of the purported interests it identified *in abstracto* rationally related to the Hodges' case in particular.[35] Neither did the court identify any "legitimate governmental interest" that supported respondents' maintenance of false AMF listings, and their lies to the Hodges concerning the data and the Hodges' supposed lack of right to a § 5-715 hearing.

The court contended that the Hodges had suffered no "stigma or defamation", "given the extensive confidentiality provisions" protecting AMF data.[36] Although it acknowledged " 'the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks' ", the court opined that the confidentiality-provisions of Maryland law " 'evidence[d] a proper concern with, and protection of, the [Hodges'] interest in privacy' ".[37] The court did not consider any "threat to privacy" in the State's maintenance of *false* information available to thousands of governmental employees, where the laws mandating "confidentiality", and the mendacity of bureaucrats, precluded the Hodges from discovering and correcting the situation.

C. The Court of Appeals denied that the Hodges' case exhibited those "extreme circumstances" that warranted expunction, because "the record would not support a contention, that CCDSS failed to comply with its statutory duty to expunge the Hodge *investigation report* in January 1994 * * * . The absence of such a contention renders the Hodges' claims for injunctive and declaratory relief moot."[38] The court apparently forgot that expungement of the Hodges' *AMF listing* would not normally occur until at least January of *1996*.[39] The court also did not suggest why anyone should believe that respondents had (or ever would) expunge the AMF listings – in light of respondents' earlier deceits, the confidentiality-provisions of Maryland law that preclude the Hodges' future access to the AMF, and the immunity the court itself afforded respondents from an action under § 1983 for maintaining knowingly false computer-entries.[40]

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[35] *Id.* at 18a.

[36] *Id.* at 15a-16a.

[37] *Id.* at 17a, *quoting* Whalen v. Roe, 429 U.S. 589, 605 (1977).

D. The Court of Appeals then ruled that respondents would have qualified immunity, even if the Hodges' rights of familial privacy had been infringed, because "these state officials could not have known that the maintenance of records * * * violated the enigmatic right of familial privacy".[41]

E. Finally, the Court of Appeals denied the Hodges' claims of procedural-due-process violations.

> [T]hat [respondents'] acts may have violated various Maryland statutory provisions, including § 5-715, is of no consequence in a § 1983 action, since a State's violation of its own laws or procedural rules, creating rights beyond those guaranteed by the Constitution, cannot support a federal due process claim.[42]

The court did not even cite *Logan* v. *Zimmerman Brush Co.*, on which the District Court had relied.[43]

This petition followed.

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[38] App. at 18a (emphasis supplied).

[39] *See ante,* note 9.

[40] *See* App. at 14a n.8.

[41] *Id.* at 20a-22a. *Accord, id.* at 24a-26a (concurring opinion).

[42] *Id.* at 23a. *Accord, id.* at 25a (concurring opinion).

[43] 455 U.S. 422 (1982), *relied on in* App. at 51a-52a.

ARGUMENT FOR ALLOWANCE OF THE WRIT

A writ of certiorari is warranted here by virtue of the axiom verified in civilization after civilization: *Those who refuse to learn from history will be condemned to repeat it.*

When the archives of the communist East German *Stasi* secret police burst open in 1992, among the "[m]ore than 300,000" who "applied to read their files" was Heinz Eggert, a Lutheran minister who "found to his horror that he had been secretly accused of child molestation".[44] *The conscience of the entire civilized world was shocked – indeed, appalled and revolted – by such revelations.* When they finally penetrated the AMF that same year, the Hodges found to their horror that they too had been secretly labelled as "indicated" for sexual abuse of their son, after respondents repeatedly assured them of their exoneration and denied them the hearing under § 5-715 that would have exposed the truth. But the Hodges' discovery was *more* shocking to a rational sense of fair play even than Heinz Eggert's – precisely because Maryland is not some communist "people's republic".

This comparison is no "melodrama" (as the Court of Appeals scoffed), but a warning. For to refuse to condemn respondents' duplicity not only deprives the Hodges of vindication, but also exposes everyone in the United States to bureaucratic abuses with potentially the most wide-ranging, serious, and irremediable consequences.[45] "[S]ubstantive due process is like a dare line drawn in the dust by a bully: when, as, and if society permits it to be crossed with impunity, everything is placed at risk."[46]

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[44] "Fear and Betrayal In the Stasi State: As the vast archives of the secret police are opened, former East Germans are finding ugly evidence of a pervasive system of deceit", *Time,* 3 February 1992, at 32, *attached as an exhibit to* Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motion to Strike Plaintiffs' Analysis of the Hodges' Department of Social Services Case-File and of the Affidavit of Alan L. Katz (Docket Entry No. 48).

Respondents' "dare line" is sharply drawn. With the blessing of the Court of Appeals – which belittles as mere " 'fastidious squeamishness or private sentimentalism' " the Hodges' outrage at being falsely labelled *"indicated"* for sexual abuse of their own son for almost three years[47] – respondents have arrogated to themselves the powers of secret police in a totalitarian state, by

- maintaining AMF listings that *falsely* showed *"indicated"* sexual child abuse;
- misrepresenting that the Hodges had been exonerated, when on the AMF they were "convicted";
- denying the Hodges access to the AMF and the hearing mandated by § 5-715, on the basis of an illegal policy;
- belatedly sanitizing the AMF after they were trapped by the filing of the instant civil-rights action; and then
- asserting – so far successfully – that the maintenance of knowingly false AMF listings is exempt from liability.

If the Court of Appeals' license for bureaucrats to behave as a home-grown *Stasi* is allowed to pollute the well of American jurisprudence, no one will be safe from the fate of Heinz Eggert and the Hodges, including even the judges whose consciences are not shocked and whose senses of fair play and decency are not offended by such bureaucratic treachery and lies.

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[45] The Court of Appeals held that respondents' "error is not actionable under § 1983". App. at 14a n.8. Presumably, the same "error" by federal bureaucrats would not be actionable under *Davis* v. *Passman*, 442 U.S. 228 (1979).

[46] deLeiris v. Scott, 642 F. Supp. 1552, 1569 (D.R.I. 1986).

[47] App. at 20a n.10.

Thus, this case raises questions of federal law that must be settled by this Court before the tragic history of East German tyranny repeats itself throughout the United States.[48]

I. This Court needs to enforce a strict substantive-due-process claim for relief here, to deter bureaucrats from larding computer-databases with knowingly false entries about innocent individuals, and to impose personal liability on them when they are caught doing so.

This Court must nip in the bud the grotesque abuse of bureaucratic power the Court of Appeals has immunized, by unequivocally sustaining a strict substantive-due-process claim for relief against bureaucrats' maintenance of knowingly false computer-listings about innocent citizens. Long ago, this Court recognized "the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks".[49] That threat pales into insignificance compared to the threats from accumulation of *knowingly false* information in governmental computers – the threat that the vaunted "information superhighway" will become a *dis*information super*railroad* on which lies about individuals become "facts" simply because they are electronically recorded; the threat that nothing can be done about such lies by the victims; and the threat that this will prove prophetic the slogan of Orwell's *1984* that "he who controls the present controls the past; and he who controls the past controls the future".

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[48] *See* Rule 10.1(c) of the Rules of this Court.

[49] Whalen v. Roe, 429 U.S. 589, 605 (1977).

A. The record here cries out for this Court to support with all its authority the Hodges' substantive-due-process claim.

1. Substantive due process

- applies to familial rights and child-abuse situations;[50]
- proscribes actions by officials that "shock[ ] the conscience", fail to "respect certain decencies of civilized conduct", or "offend[ ] the community's sense of fair play and decency";[51]
- limits "governmental power * * * 'used for purposes of oppression' "; outlaws arbitrary, capricious, and malicious governmental actions; reaches officials who engage in "a deliberate flouting of the law that trammels significant personal * * * rights" or "are guilty of grave unfairness in the discharge of their legal responsibilities"; and "strike[s] down official conduct which has sunk to subterranean depths";[52] and

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[50] *E.g.*, Weller v. Department of Soc. Servs., 901 F.2d 387, 391-92 (4th Cir. 1990); Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980) ("the right to be free of state intrusions into realms of personal privacy"); Fitzgerald v. Williams, 787 F.2d 403, 407-08 (8th Cir. 1986); Hameetman v. City of Chicago, 776 F.2d 636, 642-43 (7th Cir. 1985); Morrison v. Jones, 607 F.2d 1269, 1275-76 (9th Cir. 1979).

[51] Rochin v. California, 342 U.S. 165, 172, 173 (1952).

[52] Daniels v. Williams, 474 U.S. 327, 331 (1986); Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1407 (9th Cir. 1989); Bello v. Walker, 840 F.2d 1123, 1129 (3rd Cir. 1988); Silverman v. Barry, 845 F.2d 1072, 1080 (D.C. Cir. 1988); deLeiris v. Scott, 642 F. Supp. 1552, 1568 (D.R.I. 1986).

- applies to *all* exercises of governmental power, interdicting even "episodic" violations.[53]

2. No dispute exists that respondents maintained the *false* AMF listing that the case involved *"indicated" sexual* child abuse (although it could not rationally be categorized as "suspected child abuse" at all), while refusing to allow the Hodges access to the file, pretending that the Hodges had been exonerated, and disallowing a § 5-715 hearing on the lies that the AMF is no "central registry" and the Hodges were not "suspects". Neither can any dispute exist that respondents' actions were "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare", and thus "not within the legitimate purview of the state's power".[54]

3. The Court of Appeals' notion that the Hodges suffered no injury because the false AMF data was "confidential" is both practically wrong and legally irrelevant.[55] First, the false data was – perhaps still is – available to countless state and federal bureaucrats under color of law.[56] Second, the *Stasi's* files were secret. Yet when the dossiers were exposed, not only the revelations, but also the very idea that the *Stasi* had kept such records at all, revolted the whole world. If the *Stasi's* hidden lies about Heinz Eggert shocked the conscience of civilization, can respondents' duplicity and mendacity not at least shake the complacency of judges in Richmond, Virginia, or in Washington, D.C.?!

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[53] Sinaloa Lake Owners Ass'n, 882 F.2d at 1409; Hall, 621 F.2d at 614.

[54] Sinaloa Lake Owners Ass'n, 882 F.2d at 1407, 1409.

[55] *Pace* App. at 15a-17a.

[56] *See ante,* note 24.

B. Even were the Court of Appeals correct that respondents did not violate the Hodges' rights of privacy (which the Hodges deny),[57] the Hodges would still have a "residual" substantive-due-process claim, for which it is *not* necessary to "prove a violation of a specific [constitutional] liberty interest".[58]

C. Respondents lack a rational claim to qualified immunity, even if (as the Court of Appeals pretends) they "could not have known that the maintenance of records pertaining to the Hodges violated the enigmatic right of familial privacy".[59]

1. That respondents' conduct shocks the conscience is dispositive, because "the very concept of a violation of substantive due process is that the conduct * * * is impermissible *per se* and is thus necessarily clearly established [as unconstitutional]".[60]

2. Respondents knowingly and intentionally violated the Hodges' rights.[61] Maintenance of the false AMF listing and denial of a § 5-715 hearing, in the teeth of the Hodges' inquiries and objections and even a State-court lawsuit, evidences at least deliberate indifference to or reckless disregard of the Hodges' rights. Conduct of this

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[57] App. at 19a.

[58] Pittsley v. Warish, 927 F.2d 3, 6 (1st Cir. 1991). *Accord,* Sinaloa Lake Owners Ass'n, 882 F.2d at 1408-09 n.10.

[59] App. at 22a.

[60] Fernandez v. Leonard, 784 F.2d 1209, 1216 (1st Cir. 1986).

[61] *See, e.g.,* Malley v. Briggs, 475 U.S. 335, 341 (1986) (immunity protects "all but the plainly incompetent *or those who knowingly violate the law*"); Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (test is whether official "*knew or reasonably should have known* that the action he took" violated rights); *id.* at 821 (Brennan, J., concurring) (*Harlow* standard "would not allow the official who *actually knows* that he was violating the law to escape liability") (emphases supplied).

stamp, which is "intolerable to fundamental fairness", is inconsistent with qualified immunity.[62]

3. The "objective reasonableness" of respondents' conduct depends on Maryland law, which demolishes their defense.[63] For Maryland does not authorize maintenance of records that ***falsely*** show *"indicated"* sexual abuse.[64] And qualified immunity "is available only to officials performing discretionary functions" *within their authority* who demonstrate their entitlement to it, including proof of all necessary facts – an impossible task for respondents.[65]

D. Finally, as to declaratory and injunctive relief (from which respondents have no qualified immunity), this case is not "moot".[66] That respondents sanitized the

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[62] *Compare* Miltier v. Beorn, 896 F.2d 848, 851 (4th Cir. 1990), *with* Wood v. Sunn, 865 F.2d 982, 987 (9th Cir. 1988).

[63] *Compare* Harlow, 457 U.S. at 818, *with* Johnson v. Estate of Laccheo, 935 F.2d 109, 112 (6th Cir. 1991).

[64] *See* Maryland Code, State Government, § 10-602, *in* App. at 88a. *See* Peters v. Hobby, 349 U.S. 331, 338-49 (1955).

[65] ***Discretionary:*** Harlow, 457 U.S. at 816. *Accord, e.g.*, McCray v. State of Maryland, 456 F.2d 1, 3-4 (4th Cir. 1972); Davis v. Holly, 835 F.2d 1175, 1178 (6th Cir. 1987); People of Three Mile Island v. Nuclear Regulatory Comm'rs, 747 F.2d 139, 143 (3d Cir. 1984). ***Authorized:*** *E.g.*, McCray, 456 F.2d at 4-5; Howard v. Atkinson, 887 F.2d 134, 140 (8th Cir. 1989); Coleman v. Frantz, 754 F.2d 719, 728 (7th Cir. 1985); Barker v. Norman, 651 F.2d 1107, 1120-21, 1124-25 (5th Cir. 1981). ***Demonstrated Entitlement:*** Dennis v. Sparks, 449 U.S. 24, 29 (1980).

[66] *Pace* App. at 18a (majority opinion), 25a-26a (concurring opinion). The Hodges sued respondents in their *official*, as well as individual, capacities. As to the former, respondents are "persons" under § 1983 and have *no* immunity from suit, whether the Hodges' rights were "clearly established" in 1989 or will be recognized for the very first time by this Court. Will v. Michigan

AMF when they realized the jig was up is immaterial; for temporary cessation of unlawful activity does not moot the case, where they remain "free to return to [their] old ways".[67] Nothing prevents them from changing the AMF listing back to "indicated", so maintaining it permanently, and misrepresenting their actions to the Hodges just as they did before – *especially now that the Court of Appeals has told them that such misbehavior is not actionable under § 1983.*

II. This Court needs to declare that the right of privacy prohibits bureaucrats from maintaining knowingly false computer-listings about innocent individuals.

In this era of ever-growing and increasingly-questionable governmental surveillance of private citizens, this Court must: (A) unequivocally re-affirm that the collection and maintenance of computer-data on *intra*-familial activities impinges on rights of familial privacy, even where that information remains within the confines of governmental agencies; and (B) restate that the maintenance of knowingly false data abridges those rights – both of which self-evident points the Court of Appeals denied.

A. Congress has recognized that "the right to privacy is a personal and fundamental right protected by the Constitution", and that individual "privacy * * * is directly affected by the *collection, maintenance, use,* and dissemination of personal information".[68] *Whalen* v. *Roe*

Dep't of State Police, 491 U.S. 58, 71 & n.10 (1989); Kentucky v. Graham, 473 U.S. 159, 165-67 (1985).

[67] United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953).

[68] 5 U.S.C. §§ 552a(2)(a)(4), 552a(2)(a)(1) (emphasis supplied).

explained that that right includes the "interest in avoiding disclosure of personal matters" *to the government*, "[e]*ven without public disclosure*" of the information.[69] Although *Whalen* held that collection and maintenance of *truthful* medical information served a legitimate state goal, and therefore "d[id] not *automatically* amount to an impermissible invasion of privacy", it thereby acknowledged that under other circumstances an agency's *collection and maintenance* of information *can* be "*im*permissible".[70] The District Court relied on this ground – but the Court of Appeals rejected it.[71]

Furthermore, this Court has indicated that mere inquiry offends the right to privacy if an agency lacks a real and substantial need for the information.[72] And other courts have held that mere disclosure of private information within an agency by an officer who lacked authority to obtain the information in the first place abridges that right, as does collection of information unrelated to a legitimate governmental concern, or use of information not "proper in light of the state's interests".[73]

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[69] 429 U.S. 589, 599, 602 (1977) (footnote omitted; emphasis supplied).

[70] *Id.* at 597-98, 602 (emphasis supplied). *Accord,* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 29-31 (1976) ("[r]ecord*keeping* * * * , *if not abused or overdone,* can be useful to the State's interest in protecting * * * health"; recordkeeping provisions *sub judice,* "while perhaps approaching *impermissible* limits, are not constitutionally offensive in themselves") (emphasis supplied). *See also* Nixon v. Administrator of General Services, 433 U.S. 425, 457-65 (1977) (governmental collection and review of private papers as part of screening public papers implicates privacy-rights).

[71] *See* App. at 39a-44a, 67a-71a. *See* Rule 10.1(c) of the Rules of this Court.

[72] *See* DeGregory v. Attorney General, 383 U.S. 825, 828-30 (1966); Gibson v. Florida Legisl. Invest. Comm., 372 U.S. 539, 545-46, 554-58 (1963); Shelton v. Tucker, 364 U.S. 479, 484-90 (1960); Bates v. City of Little Rock, 361 U.S. 516, 523-25 (1960); Watkins v. United States, 354 U.S. 178, 187-88 (1957). This rule applies even if the information is *not* publicized. Local 421, AFSCME v. Schlesinger, 443 F. Supp. 431, 433-434 (D.D.C. 1978).

B. Respondents' maintenance of knowingly false information on the AMF served no conceivable governmental purpose. Moreover, respondents lacked power to maintain *any* records infringing upon familial privacy except in cases of legitimately suspected abuse. For a Maryland agency may "keep *only* the information about a person" that is "*needed* by the * * * unit to accomplish a governmental purpose"; and the "purpose" that warrants CCDSS in keeping records is "to protect children *who have been the subject of abuse*".[74] The original "report" against the Hodges immediately proved to be medical misdiagnosis, not rationally suspected child abuse, and therefore lost any "probative force".[75] Thus, respondents' retention of a spurious "abuse" case on the Hodges exceeded their authority.[76] Respondents cannot enlarge their power to maintain records and abridge the Hodges' rights of privacy by *mis*labelling medical misdiagnosis as "suspected abuse".[77]

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[73] York v. Story, 324 F.2d 450 (9th Cir. 1963); Shuman v. City of Philadelphia, 470 F. Supp. 449, 457-61 (E.D. Pa. 1979), *and* Thorne v. City of El Segundo, 726 F.2d 459, 468-71 (9th Cir. 1983), *cited with approval in* Walls v. City of Petersburg, 895 F.2d 188, 192-93 (4th Cir. 1990); Genusa v. City of Peoria, 619 F.2d 1203, 1215-17 (7th Cir. 1980).

[74] Maryland Code, State Government § 10-602, *and* Family Law § 5-702 (emphasis added), *in* App. at 88a, 86a.

[75] *See* Schware v. Board of Bar Examiners, 353 U.S. 232, 241 (1957).

[76] *See* United States v. Westinghouse Elec. Corp., 638 F.2d 570, 577-78 (3d Cir. 1980) (listing factors to "be considered in deciding whether an intrusion into an individual's privacy is justified").

The supposedly "legitimate governmental interest[s]" the Court of Appeals imagined do not relate to the circumstances of the Hodges' case, let alone to knowingly false AMF listings.[78] And respondents provided no proof for these, or any other, purported governmental interests, thereby foreclosing themselves on this score.[79]

C. The Court of Appeals fantasizes that respondents' actions were not "designed to have * * * a significant impact on the [Hodges'] parent-child relationship".[80] What could more aggress against that relationship than a governmental finding that the parents had sexually abused their child?! What could any bureaucrat who retained such a false finding on the AMF intend, other than to have "a significant impact" on that relationship in some way imaginable to the bureaucrat? And what "impact" on innocent parents and child could be more "significant" than their own government's cynical abuse of trust and mimicry of the internationally abhorred *Stasi*?

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[77] *See, e.g.*, Riley v. National Fed'n of the Blind, 487 U.S. 781, 795-96 (1988).

[78] *See* App. at 18a-19a.

[79] *Compare* note 25 & accompanying text *with* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-52 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322-25 (1986). Moreover, Maryland denies any interest in maintaining records of "ruled-out" cases for more than 120 days. 1991 Maryland Laws, ch. 461, *now* Maryland Code, Family Law § 5-707(b)(2), *in* App. at 87a.

[80] App. at 13a.

III. This Court needs to re-assert the ruling of *Logan* v. *Zimmerman Brush Co.*, in order to deter bureaucrats from devising illegal policies to deprive citizens of rights to adjudicatory procedures under State law, and to impose personal liability on them when they are caught doing so.

This Court cannot suffer bureaucrats to deny, on the basis of their own illegal policies, the very State procedures that enable victims of the bureaucrats' abuse and oppression to obtain review and relief. The Court of Appeals, however, rejected the Hodges' procedural-due-process claim on the ground that "no protected liberty interest was implicated by [respondents'] actions", even if they did intentionally violate § 5-715, as the District Court found they had.[81]

A. Section 5-715(a) mandates that "[t]he Secretary of [MDHR] shall adopt regulations necessary to protect the rights of persons suspected of [child] abuse". The remainder of § 5-715 gives a "person who is suspected of abuse" *notice* "[b]efore [his] name * * * is entered in the central registry"; requires the agency to "hold an *administrative hearing* for the purpose of allowing the person to appeal the entry of [his] name in the central registry"; and disables the agency from "enter[ing] the name of a person in the central registry unless the person has * * * *unsuccessfully appealed*" or "failed to respond * * * to notice".[82]

B. Disdaining to follow § 5-715, respondents deceitfully denied that the AMF is a "central registry" and that persons listed on it are "suspected of child abuse", precisely to rationalize disobedience to the law.[83] Their fabrications may be characterized as a "sham or pretextual conduct"; a "misuse" of authority; "a wide-spread practice that, although not authorized by written law * * * is 'so permanent and well settled as to constitute a "custom or usage" with the force of law' "; a "contraven[tion of] the requirements of a written * * * code"; or a "failure to comply with state procedures" as part of an "abuse of * * * power".[84] Under any rubric, their machinations constituted a "policy or custom", because they "sp[oke] with final policy-making authority", "ma[d]e official policy on [this] particular issue", and "h[ad] final authority over the decision-making process".[85] The Hodges complain of *this illegal* ***policy***, not an *ad hoc* violation of § 5-715.

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[81] *Id.* at 23a. *See id.* at 51a-52a.

[82] *Id.* at 83a-84a (emphasis supplied).

C. By denying the Hodges the *adjudicatory procedure* in § 5-715, on the false pretenses that the AMF is no "central registry" and they are not "suspected" abusers, respondents violated the Constitution. As *Logan* v. *Zimmerman Brush Co.* held, due process

> prevent[s] the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]." * * *

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[83] *See id.* at 47a-52a.

[84] Dwyer v. Regan, 777 F.2d 825, 831-33 (2d Cir. 1985); Hafer v. Melo, 502 U.S. ___, ___, 112 S. Ct. 358, 363 (1991); City of St. Louis v. Prapotnik, 485 U.S. 112, 127 (1988) (plurality opinion); Burtnieks v. City of New York, 716 F.2d 982, 988 (2d Cir. 1983); Zinermon v. Burch, 494 U.S. 113, 135-36 (1990).

[85] Kentucky v. Graham, 473 U.S. 159, 166 & n.12 (1985); Jett v. Dallas Independent School Dist., 491 U.S. 701, 737 (1989); Dwyer, 777 F.2d at 832.

> * * * The hallmark of property * * * is an individual entitlement grounded in state law, which cannot be removed except "for cause." * * *
>
> *The right to use [State-created] adjudicatory procedures shares these characteristics.* A claimant has more than an abstract desire or interest in redressing his grievance: his right to redress is guaranteed by the State, with the adequacy of his claim assessed under what is, in essence, a "for cause" standard, based upon the substantiality of the evidence.[86]

The "right" in *Logan* arose from a State statute barring employment-discrimination; and the "adjudicatory procedure" addressed violations of this *non*constitutional right.[87] Here, even if the Hodges' right arises only from § 5-715 itself, it entails an immunity from being listed on the AMF absent evidence of "suspect" status; and the "adjudicatory procedure" deals with assertions of this right.[88]

The Hodges plainly "ha[d] more than an abstract desire or interest" in not being falsely listed on the AMF as "indicated" for sexual child abuse. Their "right to redress" was "guaranteed by the State" in § 5-715; and, had a hearing been held, "the adequacy of [their] claim[s]" would have been "assessed under * * * a 'for cause' standard, based upon the substantiality of the evidence" for classifying them as "suspects".[89] A hearing would have uncovered the false AMF listing, and should have resulted in expungement of the entire case as involving no suspected child abuse at all.

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[86] 455 U.S. 422, 429-31 (1982) (emphasis supplied).

[87] *Id.* at 424.

[88] *See* Petition of Bagley, 513 A.2d 331, 338, 340 (N.H. 1986) (entry of parents' names into child-abuse central registry is "an official adjudication of status" that requires notice and hearing under due-process clause of State constitution); *accord as to federal law,* Sims v. State Dep't of Pub. Welfare, 438 F. Supp. 1179 (S.D. Tex. 1977), *rev'd on other grounds sub nom.* Moore v. Sims, 442 U.S. 415 (1979). This refutes the Court of Appeals' contrary view. App. at 14a-15a.

The Hodges were denied notice and hearing, not (as in *Logan*) because of respondents' innocent "inadvertence",[90] but because of their illegal policy of falsely denying that the AMF *is* a "central registry" and that the Hodges *were* "suspects". Thus, not only respondents' liability, but also the compelling need for this Court's plenary review, follows *a fortiori* from *Logan*.

IV. This Court needs to establish that expunction of false listings in governmental databases is a preferred remedy.

Finally, this Court needs to assert control over governmental computer-databases *now*, by establishing that expunction of false listings is a preferred remedy.

A. This case demands the purgative of expunction. Almost immediately, respondents knew that the Hodges' encounter with CCDSS was "purely fortuitous", and that they lacked power to retain a case of mere medical misdiagnosis in "files along with the mass of [child-abuse] records".[91] *All* the information in the file was deceptive, because it mislabelled a misdiagnosis as "suspected child abuse".[92] The key listings on the AMF were falsehoods. And respondents deceptively evaded the "intervening procedures" of § 5-715 that would have "provide[d] protection against * * * records made without basis in fact".[93] Thus, the Hodges' innocence, respondents' lies, their subversion of § 5-715, and their interposition of "patently inadequate bas[e]s" for their misdeeds all compel the conclusion that their actions were, to be charitable, "constitutionally suspect".[94]

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[89] *See* Family Law § 5-715(b), -(c), -(d)(2, 3), *in* App. at 83a-84a.

[90] 455 U.S. at 426.

[91] Menard v. Saxbe, 498 F.2d 1017, 1027-28 (D.C. Cir. 1974).

[92] *See* Callicotte v. Carlucci, 731 F. Supp. 1119, 1121 (D.D.C. 1990).

B. "The power of the federal courts to direct expungement of government records * * * maintained in violation of [constitutional] rights is well-established."[95] Expungement "is an equitable remedy designed to correct" and "to prevent future harm as a result of the original violation".[96] And it may be ordered "directly under the Constitution".[97] In particular, untrue statements can be expunged from agency records to vindicate constitutional rights, or a false record expunged where an agency acts in excess of its authority, even though the records are "administrative rather than criminal".[98]

C. Expunction alone can forefend future harm from false computer-entries in supposedly "confidential", but widely disseminated, governmental databases. In a world of "interfacing" and "networking", no one can predict where a false finding may turn up, how it will be used, and what consequences the victims will face until (perhaps) they can finally clear their names. No one should be required to live with the anxiety that some governmental agency may be maintaining (and making available to other governmental agencies) false computer-listings on him, but that he can do nothing about it – unless and until, as with Heinz Eggert in East Germany, a political revolution exposes and cures the wrongdoing.

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[93] Sullivan v. Murphy, 478 F.2d 938, 969 (D.C. Cir. 1973).

[94] *Compare* Wheeler v. Goodman, 306 F. Supp. 58, 66 (W.D.N.C. 1969), *vacated on other grounds*, 401 U.S. 987 (1971), *with* Hubbard v. Administrator, EPA, 735 F. Supp. 435, 437 (D.D.C. 1990).

[95] Reuber v. United States, 750 F.2d 1039, 1068 (D.C. Cir. 1984) (Bork, J., concurring) (emphasis added). *Accord*, Sullivan, 478 F.2d at 968-73.

[96] Carter v. Orleans Parish Public Schools, 725 F.2d 261, 263 n.4 (5th Cir. 1984).

[97] Smith v. Nixon, 807 F.2d 197, 204 (D.C. Cir. 1986).

[98] Hubbard, 735 F. Supp. at 440; Callicotte, 731 F. Supp. at 1121; Peters v. Hobby, 349 U.S. 331, 348-49 (1955); Chastain v. Kelley, 510 F.2d 1232, 1235 (D.C. Cir. 1975).

CONCLUSION

Every Justice of this Court knows that being falsely labelled a sexual abuser of one's own child – or a sexual abuser of any sort – must sicken the soul, not simply shock the conscience, of any decent man or woman. In Germany, the people no longer tolerate such oppression from the *Stasi*. The ultimate question the Hodges present, then, is "What have Americans learned from the historical example of East Germany?" Unless this Court grants the Hodges' petition, the answer must be that, as far as the federal judiciary is concerned, *the only thing one learns from history is that no one ever learns anything from history – in time.*

For these reasons, the Hodges' petition should be granted.

Respectfully submitted,

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APPENDIX

BEST AVAILABLE COPY

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

David R. Hodge; Marsha A. Hodge, his wife, individually and as parents and next friend of a minor, Joseph E. Hodge,

Plaintiffs-Appellees,

v.

M. Alexander Jones, Director of the Carroll County Department of Social Services, in his official and individual capacities; Alan L. Katz, Assistant Director of the Carroll County Department of Social Services, in his official and individual capacities; Carolyn W. Colvin, Secretary of the Department of Human Resources of the State of Maryland, in her official and individual capacities,

Defendants-Appellants,

and

Carroll County Department of Social Services,

Defendant.

No. 93-1182

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Herbert F. Murray, Senior District Judge.
(CA-92-155-HM)

Argued: December 9, 1993

Decided: July 19, 1994

Before POWELL, Associate Justice (Retired), United
States Supreme Court, sitting by designation, and
WIDENER and WILLIAMS, Circuit Judges.

Vacated in part, reversed in part, and remanded with instructions by published opinion. Judge Williams wrote the opinion, in which Judge Widener concurred. Justice Powell wrote a separate opinion concurring in the judgment.

COUNSEL

ARGUED: Evelyn Omega Cannon, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Baltimore, Maryland, for Appellants. Edwin Vieira, Jr., Manassas, Virginia, for Appellees.

ON BRIEF: J. Joseph Curran, Jr., Attorney General of Maryland, Donna R. Heller, Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Baltimore, Maryland, for Appellants. Tracy E. Mulligan, Rockville, Maryland, for Appellees.

OPINION

WILLIAMS, Circuit Judge:

We are presented with the question of the applicability of a qualified immunity affirmative defense in the context of a 28 U.S.C. § 1983 (1988), action challenging the constitutionality of Maryland's maintenance of records pertaining to suspected child abuse investigations after the alleged abusive parents have been cleared of the charges by the Department of Social Services. After finding that this practice violated Plaintiffs' substantive due process right of familial privacy and procedural due process rights, the district court denied the Defendant state officials' assertion of a qualified immunity defense and granted interlocutory summary judgment to the Plaintiff-parents on the issue of liability. We reverse, holding that, because Defendants' actions violated no clearly established federal constitutional or statutory right, the district court erroneously found for Plaintiffs on the issue of liability and denied Defendants the benefit of qualified immunity.

I.

A.

On January 20, 1989, David and Marsha Hodge took their three-month-old son Joseph to the Carroll County General Hospital in Westminster, Maryland, for examination and treatment of the child's swollen right arm. The examining physician diagnosed a fractured ulna " 'without adequate historical explanation' " and, pursuant to state law, Md. Fam. Law Code Ann. § 5-704(a) (1991 Repl.

Vol.), contacted the Carroll County Department of Social Services (CCDSS) to report suspected child abuse. (J.A. at 15.) An investigation was initiated the next day by a Child Protective Service (CPS) caseworker and a Maryland State police officer, which ultimately yielded no evidence of abuse. The caseworker filed a report with the CCDSS classifying the case as "unsubstantiated" and "ruled out."[1] (J.A. at 15.)

Within a week of the incident, the Hodges took Joseph to two medical specialists for further examination. The specialists diagnosed the swelling as osteomyelitis, a bacterial bone infection, and performed the necessary corrective surgery. Five days after the caseworker closed his investigation, Marsha Hodge called CCDSS with news of the corrected diagnosis. On February 16, 1989, David Hodge wrote CCDSS, again informing them of the misdiagnosis and requesting a copy of any CCDSS case file on the incident. In March 1989, Defendant Alan L. Katz,

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[1] "Ruled out" is defined as "a finding that abuse, neglect, or sexual abuse did not occur," while an "unsubstantiated" report is one in which "there is an insufficient amount of evidence to support a finding of indicated or ruled out [abuse or neglect]." Md. Fam. Law Code Ann. § 5-701(s), (u) (1993 Cum. Supp.).

On January 27, 1989, the same day the caseworker filed the Joseph Hodge report, the Maryland Department of Human Resources adopted new disposition categories for reported incidents of child abuse, thereby reducing the categories from four (confirmed, indicated, uncertain, or ruled out) to two (indicated or unsubstantiated). Because the new regulations did not take effect until February 6, 1989, *see* 16 Md. Reg. 2, at 157 (Jan. 27, 1989), the caseworker classified the Hodge case as "ruled out" and "unsubstantiated" in an apparent attempt to comport with each regulation.

Assistant Director of CCDSS, replied by letter that "[t]he Department's report reflects that suspected child abuse was ruled out and unsubstantiated," and attached a redacted copy of the case file. (J.A. at 16.)

Between February 1989 and May 1990, the Hodges engaged in a campaign of communications with Katz and other CCDSS officials and Maryland Department of Human Resources (MDHR)[2] Director Carolyn Colvin requesting, among other things, the full report and the destruction or expunction of any CCDSS file or document regarding the Hodge investigation. Each request was refused under Maryland's statutory bar against disclosure of confidential materials, pursuant to Md. Ann. Code art. 88A, § 5 (1991 Repl. Vol.) and Md. Regs. Code 07.01.07, and CCDSS's purported inability to expunge the file until 1994.[3] CCDSS maintained the Hodge investigation report up to and beyond the filing date of the instant action. CCDSS also registered the names David, Marsha, and Joseph Hodge in MDHR's Automated Master File (AMF), a computerized database containing a record of every Maryland citizen who has received any services, ranging from food stamps to child protective services, from a local Department of Social Services office. The AMF information pertaining to the Hodges is alphanumerically coded and shielded by state and federal law from disclosure to the general public.[4] Md. Ann. Code art. 88A, § 6 (1991 Repl. Vol. & 1993 Cum. Supp.); Md. Regs. Code 07.01.02, 07.02.07.

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[2] MDHR is the State department responsible for the coordination, administration, supervision, and monitoring of county-level departments of social services, including CCDSS.

[3] At the time in question, CCDSS was statutorily required to expunge "unsubstantiated" reports of suspected abuse or neglect after five years if no further incidents involving the same alleged perpetrator were reported during that time. *See* Md. Fam. Law Code Ann. § 5-707(b) (1984 Repl. Vol. & 1987 Cum. Supp.); 1987 Md. Laws 635, § 2. Under this scheme, the Hodge investigation report, filed in January 1989, would have been expunged in January 1994.

We note that, as of 1991, "ruled out" reports of abuse are expunged within 120 days of the report's filing. Md. Fam. Law Code Ann. § 5-707(b) (1991 Repl. Vol.); *see* 1991 Md. Laws 461 (no applicable retroactivity provision).

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[4] Because it receives federal funding, MDHR is required to comply with the confidentiality requirements of 45 C.F.R. § 205.50 (1993). *See* 45 C.F.R. §§ 1355.21, 1355.30 (1993). Maryland is also required to ensure that "all records concerning . . . reports of child abuse and neglect are confidential and that their unauthorized disclosure is a criminal offense," but "may authorize by statute disclosure to [certain persons and agencies] under limitations and procedures the State determines." 45 C.F.R. § 1340.14(i)(1), (2) (1993); *see* Md. Ann. Code art. 88A, § 6 (applicable Maryland provisions).

In finding that Defendants had violated the Hodges' procedural due process rights, the district court determined that the AMF is a "central registry" within the meaning of Md. Fam. Law Code Ann. § 5-715 (1993 Cum. Supp.); COMAR 07.02.02B(1), and was therefore subject to Maryland's procedural safeguards in § 5-715(b)-(d), which were not properly accorded to the Hodges. *Hodge v. Carroll County Dep't of Social Servs.*, 812 F. Supp. 593, 604 (D. Md. 1992). In light of our conclusion that no constitutional right of familial privacy is implicated in this case, we need not review the district court's AMF determination.

B.

Continued refusals to disclose and expunge the investigation report prompted David and Marsha Hodge, individually and as parents and next friends of Joseph Hodge,[5] to file this action against CCDSS, its Director M. Alexander Jones, Assistant Director Katz, and MDHR Secretary Colvin. The Hodges claimed that, contrary to the protections of the Due Process Clause of the Fourteenth Amendment, maintenance of a record of "unsubstantiated" and "ruled out" child abuse violated their liberty interest in familial privacy, and that failure to provide notice and a hearing before maintaining that record violated their procedural due process rights.

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[5] In conducting our review of the complaint in this case, we are left with serious questions as to Joseph Hodge's standing in this cause of action. The Hodges' allegations focus on the purported detrimental labeling of David and Marsha Hodge as child abusers, but assert no injury stemming from the designation of Joseph as a supposed victim of abuse. The abridgment of the rights of personal and familial privacy and familial autonomy is alleged only as to David and Marsha Hodge. The Maryland procedural safeguards upon which the Hodges' procedural due process claims are predicated extend solely to persons *suspected* of abuse or neglect, not to the purported *recipients* of that abuse or neglect. Md. Fam. Law Code Ann. § 5-715. Hence, the complaint's first claim for relief – alleging that David, Marsha, and Joseph Hodge were "deprived of fundamental and absolute rights of procedural due process they otherwise should enjoy as *persons alleged to be child abusers*," (J.A. at 46-47) (emphasis added) – is inapplicable to Joseph. The second claim for relief seeks redress for injuries suffered by David, Marsha, and Joseph Hodge as alleged in paragraph 46 of the complaint, which makes no mention of Joseph.

Finding that Defendants maintained the Hodge investigation report without legitimate justification and entered the related entries into the AMF without a legitimate state interest or the procedural protections of § 5-715, the district court granted the Hodges' motion for interlocutory summary judgment on the issue of liability. *Hodge,* 812 F. Supp. at 608-09. The court rejected Defendants' proffered qualified immunity defense on a determination that both the protected interest of familial privacy and the procedural safeguards of § 5-715 were clearly established at the time of Defendants' acts. *Id.* at 607-08. Defendants have properly invoked the "collateral order" doctrine in appealing the denial of their qualified immunity defense. *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985).

II.

Qualified immunity "is an accommodation by the courts to the 'conflicting concerns' of, on one hand, government officials seeking freedom from personal monetary liability and harassing litigation and, on the other hand, injured persons seeking redress for the abuse of official power." *Hodorowski v. Ray,* 844 F.2d 1210, 1216 (5th Cir. 1988) (quoting *Anderson v. Creighton,* 483 U.S. 635, 638 (1987)). As such, "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson,* 483 U.S. at 639 (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818-19 (1982)). We have previously held that individuals involved in the investigation of child abuse may properly assert qualified immunity in appropriate situations. *Wildauer v. Frederick County*, 993 F.2d 369, 373 (4th Cir. 1993); *see also Achterhof v. Selvaggio*, 886 F.2d 826, 829-30 (6th Cir. 1989) (the entry of an individual's name in a central registry as a child abuse suspect is an administrative act for which qualified immunity may be asserted).

In finding that Defendants were not entitled to qualified immunity, the district court concluded that they had violated the Hodges' "clearly established" constitutional right of familial privacy and autonomy, which it defined by referencing the Supreme Court's 1977 pronouncement that "[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition," *Moore v. City of East Cleveland*, 431 U.S. 494, 503-54 (1977), and acknowledging the " 'private realm of family life which the state cannot enter,' " *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 842 (1977) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). *Hodge*, 812 F. Supp. at 607. The court also cited *Bohn v. County of Dakota*, 772 F.2d 1433, 1435 (8th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986), an Eighth Circuit case recognizing the privacy implications of information repositories pertaining to suspected child abuse. *Hodge*, 812 F. Supp. at 608.

We review the court's denial of qualified immunity *de novo*. *Bryant v. Muth*, 994 F.2d 1082, 1086 (4th Cir.), *cert. denied*, 114 S. Ct. 559 (1993). The Supreme Court requires that such review begin with an inquiry into whether familial privacy was indeed a clearly established constitutional right which Defendants violated by retaining the Hodge investigation report. *Siegert v. Gilley,* 500 U.S 226, 231 (1991). This requires that we focus first on the confines of the asserted liberty interest of familial privacy.

A.

Much like the foundational concept of individual privacy, *see Roe v. Wade,* 410 U.S. 113, 152-53 (1973), the sanctity of the family unit is a fundamental precept firmly ensconced in the Constitution and shielded by the Due Process Clause of the Fourteenth Amendment. *Jordan by Jordan v. Jackson,* 15 F.3d 333, 343 (4th Cir. 1994) ("The bonds between parent and child are, in a word, sacrosanct, and the relationship between parent and child inviolable except for the most compelling reasons."); *see Stanley v. Illinois,* 405 U.S. 645, 651 (1972) (familial integrity shielded by Ninth Amendment and Due Process and Equal Protection Clauses of Fourteenth Amendment). The concept of familial privacy has been restricted by the Supreme Court to (1) thwarting governmental attempts to interfere with particularly intimate family decisions,[6] and (2) voiding government actions that sever, alter, or otherwise affect the parent/child relationship.[7] Likewise, the individual privacy cases have focused primarily on shielding two interests: "the individual interest in avoiding disclosure of personal matters, and . . . the interest in independence in making certain kinds of important decisions." *Whalen v. Roe,* 429 U.S. 589, 599-600 (1977) (footnotes omitted). Following that lead, circuit courts have strictly construed actionable violations of the familial privacy right to encompass only those instances where state officials' actions were directly aimed at the parent-child relationship, *Pittsley v. Warish,* 927 F.2d 3, 8 (1st Cir.), *cert. denied,* 112 S. Ct. 226 (1991), implicated the "most essential and basic aspect of familial privacy – the right of the family to remain together without the coercive interference of the awesome power of the state," *Duchesne v. Sugarman,* 566 F.2d 817, 825 (2d Cir. 1977), "drove a wedge into [a] family and threatened its very foundation," or "eroded the family's solidarity internally and impaired the family's ability to function," *Bohn,* 772 F.2d at 1436 n.4.

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[6] *See, e.g., Moore,* 431 U.S. at 499-500 (family living arrangements); *Cleveland Bd. of Educ. v. LaFleur,* 414 U.S. 632, 639-40 (1974) (mandatory maternity leave without pay); *Roe,* 410 U.S. at 154 (abortion); *Griswold v. Connecticut,* 381 U.S. 479, 486 (1965) (birth control); *Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925) (parochial education of children).

The maxim of familial privacy is neither absolute nor unqualified, and may be outweighed by a legitimate governmental interest. *Moore,* 431 U.S. at 499-500; *see Lehr v. Robertson,* 463 U.S. 248, 256 (1983) (constitutional protection available for parent-child relationship in "appropriate cases"); *Prince,* 321 U.S. at 166 ("But the family itself is not beyond regulation in the public interest. . . . "). "The right to family integrity clearly does not include a constitutional right to be free from child abuse investigations." *Watterson v. Page,* 987 F.2d 1, 8 (1st Cir. 1993). In this case, the Hodges concede, as indeed they must, that Maryland has a legitimate interest in curtailing the abuse and neglect of its minor citizens. *See Santosky,* 455 U.S. at 766 (state has "*parens patriae* interest in preserving and promoting the welfare of the child"). *But see Parham v. J.R.,* 442 U.S. 584, 603 (1979) ("The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." (emphasis in original)). The Hodges contend, however, that the legitimate governmental interest is extinguished once reports of suspected child abuse have been determined to be "unsubstantiated" or "ruled out," thereby necessitating the elimination of any and all records pertaining to the vindicated suspect and his or her alleged acts.

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[7] *See, e.g., Santosky v. Kramer,* 455 U.S. 745, 753 (1982) (termination of parental rights); *Little v. Streater,* 452 U.S. 1, 13 (1981) (determining paternity); *Stanley,* 405 U.S. 651-52 (unwed father's fundamental right in care and custody of children).

There is little, if any, clear guidance in the relevant caselaw that would permit us to chart with certainty the amorphous boundaries between the Scylla of familial privacy and the Charybdis of legitimate governmental interests. *Frazier v. Bailey,* 957 F.2d 920, 931 (1st Cir. 1992) ("[T]he dimensions of [the] right [to familial privacy] have yet to be clearly established."); *see also Doe v. Louisiana,* 2 F.3d 1412, 1416 (5th Cir. 1993) (while there is a constitutional right to "family integrity," it is not clearly established), *cert. denied,* 114 S. Ct. 1189 (1994); *Hodorowski,* 844 F.2d at 1217 (the right to "family integrity" is a "nebulous" one). Nonetheless, we are convinced that, whatever the precise confines of the familial privacy right, the pale shadow briefly cast over the Hodges by

Defendants' actions cannot be classified within either of the lines of Supreme Court family privacy cases, and thereby constitutes "[s]tate action that affects the parental relationship only incidentally . . . [and] is not sufficient to establish a violation of a [sic] identified liberty interest." *Pittsley*, 927 F.2d at 8; *see Griffin v. Strong*, 983 F.2d 1544, 1549 (10th Cir. 1993) (police officer's false statement to plaintiff, that her husband had confessed to child abuse, did not unduly interfere with plaintiff's right to familial association).

Although the records retained by CCDSS reference the Hodge family, the facts of this case do not reach "an abstract due process liberty interest in family relationships." *Frazier*, 957 F.2d at 930. The Hodges' utter failure to demonstrate that Defendants' actions were designed to have, have had, or even will have, a significant impact on the parent-child relationship or on their family's ability to function precludes the establishment of a familial privacy infringement of constitutional magnitude.[8] *See Santosky*,

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[8] It is this very shortcoming that precludes the Eighth Circuit's decision in *Bohn* from controlling the instant case. In *Bohn*, once the investigation found evidence of purported abuse, state officials assigned social workers who repeatedly met with the Bohn family in an attempt to halt the purported abuse and related problems, thereby engaging in a campaign of intrusive conduct aimed at the very core of the Bohn family. *Bohn*, 772 F.2d at 1434-35. The Eighth Circuit found that the Bohns were exposed to "public opprobrium" and, thereby, stigmatized. *Id.* at 1436 n.4. The Hodge investigation report was permitted to lie fallow within Maryland's confidential record-keeping system, unaccompanied by any state efforts to impinge upon the Hodge family. Hence, *Bohn* does not alter our conclusion that, by confidentially retaining unsubstantiated and ruled out abuse reports,

455 U.S. at 753-54; *Griffin*, 983 F.2d at 1548; *cf. Rucker v. Harford County*, 946 F.2d 278, 282 (4th Cir. 1991) (police conduct neither directed at nor directly impinging upon family relationship does not violate liberty interest of intimate association of the family), *cert. denied*, 112 S.Ct. 1175 (1992). "[T]he liberty interest protected by the substantive due process clause was [not] intended to protect every conceivable family relationship from governmental interference, no matter how far removed. . . . " *Pittsley*, 927 F.2d at 9.

Our reading of the Hodges' complaint reveals no more than a conclusory allegation of reputational injury which, absent a cognizable stigma and the ensuing loss of a tangible interest, fails to state a cause of action under § 1983.[9] *See Paul v. Davis*, 424 U.S. 693, 701 (1976). The

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Defendants remained clear of the Hodges' familial privacy rights. To the extent that the records maintained by Defendants erroneously identified the Hodges as child abusers for some period of time, such error is not actionable under § 1983. *See infra* note 9.

[9] In their appellate brief, the Hodges make much of the fact that, upon the district court's unsealing of the Hodges' otherwise confidential CPS case file, it was discovered that between January 23, 1989 and January 21, 1992, the alphanumeric codes on the computerized data base component of the AMF erroneously described the Hodges' case as one of indicated sexual child abuse. In a style better suited to melodrama, the Hodges liken the AMF to East German police files maintained during that Communist regime, and histrionically argue that Defendants are guilty of usurping "*a power to mimic the secret police of a totalitarian state.*" Appellees' Brief at 18 (emphasis in original).

We find nothing in the record to indicate that the Hodges amended their complaint to allege this inaccuracy as an additional basis for recovery against Defendants. Notwithstanding

Hodges have neither alleged nor demonstrated any alteration of legal status or injury resulting from any purported defamation that would warrant a finding of a deprivation of a liberty interest otherwise shielded by the substantive and procedural guarantees of the Fourteenth Amendment. *See id.* at 708-09. The only altered legal status discernable from the Hodges' claims is the investigation report's potentially negative impact on the national security clearances that David and Marsha Hodge hold, and must continue to hold, in connection with their employment. Because national security clearances are not "property" within the protective scope of the Due Process Clause, *Jamil v. Secretary, Dep't of Defense*, 910 F.2d 1203, 1209 (4th Cir. 1990), that potential negative impact does not constitute a tangible deprivation resulting from governmental action. *See Paul*, 424 U.S. at 708.

Moreover, given the extensive confidentiality provisions protecting the Hodge investigation report, we see no avenue by which a stigma or defamation labeling the Hodges as child abusers could attach. *See Bollow v. Federal Reserve Bank*, 650 F.2d 1093, 1101 (9th Cir. 1981) ("Unpublicized accusations do not infringe constitutional

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the Hodges' apparent failure to preserve such a claim below, we agree with the district court's conclusion that "the state of the information of the AMF relates more to a common law claim for defamation than a constitutional claim for deprivation of liberty and property without due process of law. This is *not* a defamation case." *Hodge*, 812 F. Supp. at 603 n.5 (emphasis in original) (J.A. at 87, n.5); *see Wildauer*, 993 F.2d at 373 ("The publication of information regarding child abuse or neglect to entities authorized by law to receive such reports does not state a claim under § 1983.").

liberty interests because, by definition, they cannot harm 'good name, reputation, honor, or integrity.' ") (quoting *Bishop v. Wood,* 426 U.S. 341, 348 (1975)), *cert. denied,* 455 U.S. 948 (1982); *see also Watson v. Lowcountry Red Cross,* 974 F.2d 482, 487-88 (4th Cir. 1992) (remote possibility of public disclosure of confidential medical records does not rise to level of constitutional privacy violation). Maryland law provides that the unauthorized disclosure of confidential information regarding reports of abuse or neglect is a misdemeanor, subject to imprisonment up to ninety days, a fine up to $500, or both. Md. Ann. Code, art. 88A, § 6(b), (e). Data concerning a child abuse investigation and its disposition is entered into the AMF in alphanumeric code and is not accessible to the general public. Information from these records may be disclosed only to a limited number of persons specified by state statute, including social services or CPS officials investigating abuse or providing services to persons named in the reports or otherwise carrying out their official functions, licensed practitioners rendering medical care to an abused child, and under certain circumstances the parent or custodian and the alleged abuser. Md. Ann. Code, art. 88A, § 6(b). We agree with the district court that these safeguards "adequately limit access to the information [pertaining to the Hodges]." *Hodge,* 812 F. Supp. at 602.

The Maryland statutory safeguards are virtually identical to those deemed satisfactory by the Supreme Court in the context of a New York computerized database identifying all users and prescribers of Schedule II pharmaceuticals within the State of New York. *Whalen,* 429 U.S. at 593-95, 605. The tangential possibility of public disclosure of the Hodge investigation report or the

AMF entry, through such theoretical means as negligent or improperly motivated state employees or fortuitous computer hackers, cannot by itself implicate a constitutional privacy right. *Id.* at 600-02; *Watson,* 974 F.2d at 487; *Walls v. City of Petersburg,* 895 F.2d 188, 194 (4th Cir. 1990) ("When there are precautions to prevent unwarranted disclosure, an individual's privacy interest is weakened."). Despite "the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files," the record in this case does nothing to refute our conclusion that Maryland's "statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the [Hodges'] interest in privacy." *Whalen,* 429 U.S. at 605.

We see a correlation between the instant case and the maintenance of arrest and criminal records, even after the persons implicated therein have been acquitted or the charges upon which those records are predicated are dropped. While it is true that such records may be expunged, there is no *automatic* right to expunction once an individual's name has been cleared. *See United States v. Pinto,* 1 F.3d 1069, 1070 (10th Cir. 1993); *United States v. Scott,* 793 F.2d 117, 118 (5th Cir. 1986). Expunction in those instances is a discretionary function of the court, rarely utilized absent extreme circumstances, and "mere acquittal of the subsequent charge is an insufficient reason to grant expunction." *United States v. Friesen,* 853 F.2d 816, 818 (10th Cir. 1988); *see also Geary v. United States,* 901 F.2d 679, 680 (8th Cir. 1990) (same); *United States v. Stromick,* 710 F. Supp. 613, 614 (D. Md. 1989) (convicted individual's subsequent law-abiding life does not warrant expunging criminal records). Given that arrest and criminal records are matters of public record, easily obtained upon request, and that there is no automatic right to expunction thereof, it simply does not follow that the Hodges can claim a right of expunction of unsubstantiated abuse records maintained in a manner consistent with the Constitution and procedural safeguards approved by the *Whalen* Court. *Reuber v. United States,* 750 F.2d 1039, 1068 (D.C. Cir. 1984) (Bork, J., concurring) (records expunged only where such procedures are "essential to prevent future harm" from constitutional violations).

The Hodges do not contend, and the record would not support a contention, that CCDSS failed to comply with its statutory duty to expunge the Hodge investigation report in January 1994, five years after the filing of that report. *See supra* note 3. The absence of such a contention renders the Hodges' claims for injunctive and declaratory relief moot. Our concern in this appeal is therefore restricted to the Hodges' justiciable claims for damages and attorney fees against Defendants in their individual capacities. *See Will v. Michigan Dep't of State Police,* 491 U.S. 58, 71 (1989) (Eleventh Amendment precludes monetary damages against state officers in their official capacities).

Finally, we note our disagreement with the Hodges' contention that the State lacks a legitimate governmental interest once an abuse report has been deemed "unsubstantiated" or "ruled out." The retention of these investigation reports continues to serve legitimate state interests in the welfare of children. For instance, a series of "unsubstantiated" or "ruled out" entries for a given child may arouse suspicion of a pattern or practice of emotional and physical harm to a child, warranting further inquiry by the State. Retained records could, in fact, protect the individual whose record is kept by preventing repeated investigations when more than one person makes the same accusation. Finally, such records allow the state to defend itself in the event of a suit alleging inadequate investigation of a reported instance of child abuse. *See Roth v. Reagen,* 422 N.W.2d 464 (Iowa 1988). We should not interfere with a State's concentrated efforts to implement an orderly and rational legislative scheme calculated to halt the growing problem of child abuse. *See Whalen,* 429 U.S. at 597-98.

The Hodges would have us expand penumbral privacy rights beyond the fixed boundaries of established precedent in order to establish a justiciable injury in the confidential maintenance of "unsubstantiated" or "ruled out" child abuse investigation reports. We decline to tread so boldly, echoing instead the Supreme Court's prudent restraint in refusing "to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause." *Bowers v. Hardwick,* 478 U.S. 186, 194 (1986). The record before us presents no substantive due process violation of a familial privacy liberty interest by virtue of the retention of the Hodge investigation report.[10]

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[10] The discussion above also supports our rejection of the Hodges' alternative argument, under the "residual protections of 'substantive due process,' " because nothing in the record supports their conclusory allegations of "state action so

B.

Given our conclusion above, it is technically unnecessary for us to discuss the district court's denial of qualified immunity. "If there is no violation of a federal right, there is no basis for a section 1983 action and no answer to a plea by the public officer of qualified immunity." *Clark v. Link,* 855 F.2d 156, 161 (4th Cir. 1988).

Nevertheless, we feel compelled to address a matter raised in the district court's opinion with which we find a fundamental error, namely the court's generalized formulation of a constitutional right which prevents reasonable government officials from knowing just what conduct is actually prohibited by the broad concept of family inviolability. *Anderson,* 483 U.S. at 639 ("[I]f the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow* . . . [and would transform *Harlow*] from a guarantee of immunity into a rule of pleading."). We commend the district court's thoughtful consideration of the familial privacy right, but note that it is this very need for such

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arbitrary and irrational, so unjustified by any circumstance or governmental interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies." *Rucker v. Harford County,* 946 F.2d 278, 281 (4th Cir. 1991), *cert. denied,* 112 S.Ct. 1175 (1992). Defendants' conduct neither "shocks the conscience" nor "offends the community's sense of fair play and decency" because they did nothing more than "offend some fastidious squeamishness or private sentimentalism." *Rochin v. California,* 342 U.S. 165, 172, 173 (1952).

complex legal analysis that renders a denial of qualified immunity inappropriate in this case. Absent our conclusion that Defendants violated no constitutional rights, this would be a proper case for the application of qualified immunity because "[o]fficials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Maciariello v. Sumner,* 973 F.2d 295, 298 (4th Cir. 1992), *cert. denied,* 113 S.Ct. 1048 (1993). To expect Defendants to resolve what reasonable jurists have long debated – namely the precise strictures of the penumbral right of familial privacy, cast in the sweeping language of the Supreme Court cases cited by the district court, especially in the face of a legitimate state interest such as the effective detection and prevention of child abuse – is to impose burdens and expectations well beyond their reasonable capacities.[11] *See Swanson v. Powers,* 937 F.2d 965,

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[11] The district court erroneously relied on dicta in *Bohn* in finding that a report indicating the existence of "substantial evidence" of child abuse by parents could implicate the "privacy and autonomy of familial relationships." *Hodge,* 812 F.Supp. at 608 (quoting *Bohn,* 772 F.2d at 1434, 1435). Defendants' failure to discover and appreciate the significance of dicta contained in a decision by the Eighth Circuit is hardly a legitimate rationale for depriving them of qualified immunity. *Achterhof v. Selvaggio,* 757 F. Supp. 837, 840 (W.D. Mich. 1991) ("Another circuit court's generalized remark regarding a family's rights . . . fail to suggest the contours of any right that defendants reasonably should have known they were violating.").

We are aware of a recent Second Circuit case in which that court found an adequate cause of action for a liberty interest deprivation where the plaintiff's inclusion on a child abuse central registry caused both defamation of her character *and* a statutory impediment to employment in the child care industry due to a requirement, under New York law, that all child care

968 (4th Cir. 1991) (inappropriate to deny qualified immunity where state official would be required "to predict the future course of constitutional law," or "to recognize the significance of a few scattered cases from disparate areas of the law" (quoting *Lum v. Jensen*, 876 F.2d 1385, 1389 (9th Cir. 1989) and *Lojuk v. Johnson*, 770 F.2d 619, 628 (7th Cir. 1985))), *cert. denied,* 112 S.Ct. 871 (1992).

Absent more fact-specific authority to assist them, these state officials could not have known that the maintenance of records pertaining to the Hodges violated the enigmatic right of familial privacy. *Hodorowski,* 844 F.2d at 1217 (state officials could not have known that removing plaintiffs' children from their home violated the right of family integrity). On the facts of this case and in light of pre-existing law, we cannot say that the purported unlawfulness of retaining records of unsubstantiated child abuse charges should have been apparent to Defendants. *Anderson,* 483 U.S. at 640; *Swanson,* 937 F.2d at 969 ("[T]he 'contours of the right' must have been so conclusively drawn as to leave no doubt that the challenged action was unconstitutional." (quoting *Anderson,* 483 U.S. at 640)). Because qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs,* 475 U.S. 335, 341 (1986), that defense was improvidently denied below.

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employers check the registry before hiring job applicants and submit a written explanation for hiring applicants actually listed in that registry. *Valmonte v. Bane,* 18 F.3d 992 (2d Cir. 1994). Aside from the obvious factual distinctions between *Valmonte* and the instant case, the recent date of the *Valmonte* decision precludes its consideration as clearly established law at the time of Defendants' acts.

III.

Finally, as to the Hodges' claims of procedural due process violations, our decision in Section II.A. that no protected liberty interest was implicated by Defendants' actions obviates any federal constitutional requirement of procedural due process. *Zinermon v. Burch,* 494 U.S. 113, 125 (1990); *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538 (1985). The fact that Defendants' acts may have violated various Maryland statutory provisions, including § 5-715, is of no consequence in a § 1983 action, since a State's violation of its own laws or procedural rules, creating rights beyond those guaranteed by the Constitution, cannot support a federal due process claim. *Olim v. Wakinekona,* 461 U.S. 238, 248-51 (1983); *Riccio v. County of Fairfax,* 907 F.2d 1459, 1466 (4th Cir. 1990); *Weller v. Dep't of Social Servs.,* 901 F.2d 387, 392 (4th Cir. 1990). Hence, the Hodges have no cognizable claim for violation of any federal procedural due process rights.

IV.

In conclusion, the Hodges have not demonstrated a violation of any federal constitutional or statutory right of familial privacy. The confines of that right were not so clearly established that, even if Defendants' acts did impinge the Hodge family's zone of privacy, they could objectively or reasonably have known that their conduct violated the Due Process Clause. The absence of any liberty interest deprivation requires that we vacate the partial judgment for Plaintiffs on the issue of liability, reverse the district court's order rejecting Defendants' proffered qualified immunity, and remand with instructions to enter a judgment in favor of Defendants.

VACATED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS

POWELL, Associate Justice, concurring in the judgment:

Defendants appeal, prior to final judgment, the district court's denial of their claim of qualified immunity. *See Mitchell v. Forsyth,* 472 U.S. 511 (1985). Defendants are entitled to qualified immunity from civil monetary damages if their conduct did not violate the Hodges' clearly established federal statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). In deciding this question, the Court may, in the exercise of its discretion, reach the merits of the underlying constitutional question at issue. *See O'Bar v. Pinion,* 953 F.2d 74, 80 (4th Cir. 1991). I prefer not to reach them.

The Hodges contend that Defendants violated their substantive and procedural rights under the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1. To rely on the Due Process Clause, the Hodges must establish a life, liberty or property interest protected by that Clause. *Weller v. Department of Social Servs.,* 901 F.2d 387, 391 (4th Cir. 1990). In this case, there are two possible sources of a constitutionally protected liberty interest: (1) the Due Process Clause itself, and (2) the statutory scheme established by Maryland to protect the rights of suspected child abusers.

For the reasons stated by the Court in Section II.B., I agree that the Hodges have not alleged a violation of a clearly established, constitutionally protected liberty interest in "familial privacy." *See Pritchett v. Alford,* 973 F.2d 307, 312 (4th Cir. 1992) ("In determining whether the specific right allegedly violated was 'clearly established,' the proper focus is not upon the right at its most general or abstract level, but at the level of its application to the specific conduct being challenged." (citations omitted)). Nor have they alleged a violation of a clearly established, constitutionally protected liberty interest founded in Maryland law. *See Hewitt v. Helms,* 459 U.S. 460, 469 (1983) ("[A] State may create a liberty interest protected by the Due Process Clause through its enactment of certain statutory or regulatory measures."). Even assuming that the Automated Master File is a "central registry" to which Maryland's procedural guarantees attach, *see* Md. Fam. Law Code Ann. § 5-715 (1993 Cum. Supp.), it is not clearly established that such procedures place "substantive limitations on official discretion" sufficient to create a liberty interest protected by the federal constitution of which a reasonable person in Defendants' position would have known. *See Olim v. Wakinekona,* 461 U.S. 238, 249-51 (1983); *Edwards v. Johnston County Health Dep't,* 885 F.2d 1215, 1220 (4th Cir. 1989) (noting that "mere procedural guidelines" do not create a constitutionally protected liberty interest) (citing *Hewitt v. Helms,* 459 U.S. at 471).

Therefore, even assuming that Defendants' actions infringed a constitutionally protected liberty interest, such interest was not clearly established at the time of Defendants' conduct. As such, Defendants are entitled to qualified immunity and the Hodges' claims for monetary relief must fail. In addition, I agree with the Court that the Hodges' requests for declaratory and injunctive relief are moot. *See ante,* at 13. I thus concur in the judgment of the Court.

David R. HODGE, et al.

v.

CARROLL COUNTY DEPARTMENT OF SOCIAL SERVICES, et al.

Civ. No. HM-92-155

United States District Court,
D. Maryland.

Sept. 21, 1992.

Family brought action against officials of social services departments under § 1983. Officials moved to dismiss or in the alternative for summary judgment and family moved for interlocutory summary judgment. The District Court, Herbert F. Murray, Senior District Judge, held that: (1) family could seek equitable relief against officials in their official capacities and monetary relief against officials in their individual capacities under Eleventh Amendment; (2) family stated a claim under § 1983 based on alleged deprivation of their protected interest in familial privacy; and (3) officials were not entitled to qualified immunity.

Ordered accordingly.

* * *

Tracy E. Mulligan, Rockville, MD, Edwin Vieira, Jr., Independent Hill, VA, for plaintiffs.

Donna R. Heller, Shelly E. Mintz, Baltimore, MD, for defendants.

MEMORANDUM

HERBERT F. MURRAY, Senior District Judge.

The plaintiffs, David and Marsha Hodge, individually and on behalf of their son, Joseph Hodge, have filed this § 1983 action against the defendants, the Carroll County Department of Social Services ("CCDSS"), M. Alexander Jones, Director of CCDSS, Alan Katz, Assistant Director of CCDSS, and Carolyn Colvin, Director of the Maryland Department of Human Relations ("MDHR"), with respect to an investigation by CCDSS into a report of suspected child abuse. Pending before this Court are the motion of the defendants to dismiss or in the alternative for summary judgment and the motion of the plaintiffs for interlocutory summary judgment. For the reasons stated below, this Court will grant the defendants' motion in part and deny that motion in part, and grant the plaintiffs' motion.

I. MOTION TO DISMISS

The defendants raise three arguments in support of their motion to dismiss: first, that the plaintiffs have failed to state a claim for relief under 42 U.S.C. § 1983; second, that the defendants enjoy absolute immunity from suit under the Eleventh Amendment to the United States Constitution; and third, that the individual defendants enjoy qualified immunity in this case. This Court will consider each of those arguments, although in a slightly different order.

A. *Eleventh Amendment Immunity*

The Eleventh Amendment provides the States and their agents with absolute immunity from suit in the federal courts. *Edelman v. Jordan,* 415 U.S. 651, 662-63, 94 S.Ct. 1347, 1355-56, 39 L.Ed.2d 662 (1974). When considering whether that immunity precludes federal claims against a particular local entity, courts must examine the essential nature of that entity under state law. *Mt. Healthy City Bd. of Educ. v. Doyle,* 429 U.S. 274, 280, 97 S.Ct. 568, 572-73, 50 L.Ed.2d 471 (1977).

The United States Court of Appeals for the Fourth Circuit already has examined Maryland's social services system in the context of Eleventh Amendment immunity, and has concluded that the county departments of social services are agencies of the State for Eleventh Amendment purposes. *Keller v. Prince George's County,* 923 F.2d 30, 32 (4th Cir.1991); *see also Williams v. Anderson,* 753 F.Supp. 1306, 1311 (D.Md.1990) (holding Kent County Department of Social Services immune from suit under the Eleventh Amendment). Accordingly, the Eleventh Amendment precludes this action against CCDSS.

To the extent that the plaintiffs seek monetary damages, the Eleventh Amendment also precludes claims in federal court against the individual defendants in their official capacities. *Edelman,* 415 U.S. at 663, 94 S.Ct. at 1355-56. However, an exception to immunity exists for federal claims for purely prospective equitable relief, even if such claims might have an ancillary effect on the State Treasury. *See Quern v. Jordan,* 440 U.S. 332, 337, 99 S.Ct. 1139, 1143, 59 L.Ed.2d 358 (1979) (citing *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)).

Finally, absolute immunity under the Eleventh Amendment does not extend in any event to individual state officials sued in their individual capacities.

In this case, the plaintiffs have named Jones, Katz, and Colvin in both their official and individual capacities. Within the Eleventh Amendment framework outlined above, the plaintiffs may seek equitable relief against the individual defendants in their official capacities and monetary relief against those defendants in their individual capacities. Accordingly, this Court will not grant the defendants' motion to dismiss those claims based on Eleventh Amendment immunity.

B. *Failure to State a Claim*

In further support of their motion to dismiss the complaint, the individual defendants argue that the plaintiffs have failed to state a claim upon which relief may be granted. Because the parties both have submitted matters outside the complaint, this Court will transform the defendants' motion to dismiss into one for summary judgment. Fed.R.Civ.P. 12(b).

Rule 56(c) of the Federal Rules of Civil Procedure permits a grant of summary judgment only if no genuine issues of material fact exist and the moving party is entitled to a judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The burden is on the moving party to demonstrate the absence of such issues of material fact. For the purposes of deciding the defendants' motion, this Court must construe all facts and reasonable inferences in favor of the plaintiffs. *Celotex Corp. v. Catrett*, 477 U.S.

317, 323-24, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). Mindful of these well-established principles, this Court will proceed to a reading of the complaint and evidence submitted in this case in connection with the defendants' motion.

On January 20, 1989, David and Marsha Hodge admitted their three-month-old son, Joseph, into Carroll County General Hospital for examination and treatment of swelling in Joseph's right arm. Diagnosing Joseph's condition as a broken right ulna "without adequate historical explanation," the doctor treating Joseph referred the case to CCDSS as a case of suspected child abuse. At the same time, the doctor informed the Hodges of his decision to report the case to CCDSS.

The next day, a social worker from CCDSS named Richard Loper began an investigation of the reported abuse. Accompanied by a Maryland State Trooper, Loper interviewed the Hodges and the doctor who reported the suspected abuse at the hospital. Loper also conducted interviews of other persons, including Phyllis A. Hodge, David's mother. Finding no evidence of abuse, Loper classified the case as "unsubstantiated" and "ruled out" and filed his report with the CCDSS.

At CCDSS, Loper's investigatory report was entered onto the Automated Master File ("AMF"), a comprehensive computerized data base that contains a record of every individual in Maryland who has received any kind of "service" from any of the local DSS offices. "Services" range from food stamps to, as in this case, "Child Protective Services" ("CPS"). From any computer terminal connected to the AMF, CCDSS employees and any other users can obtain information about any recipient of DSS services from any DSS computer terminal, *i.e.*, at the present time, any individual in Maryland using the AMF can learn that Joseph, son of David and Marsha Hodge, received CPS services in January 1989.[1] Using the case number listed on the AMF, a DSS worker also can obtain the Hodge's case file, which contains a copy of all of the documents generated in the case.[2]

Unsatisfied with the initial diagnosis of a fractured arm, the Hodges took Joseph to another doctor. Discovering no broken bones at all, the second doctor diagnosed the swelling condition as osteomyelitis, a bacterial bone infection, and successfully treated Joseph for that ailment. On January 27, 1989, Martha Hodge notified Loper about the second diagnosis and treatment and pointed out that child abuse could not possibly have caused the problem with Joseph's arm.

Confident that the diagnosis of osteomyelitis had ended any suspicion that they had abused their son, the Hodges requested in February 1989 that CCDSS permit them to inspect their case file to ensure that it completely and accurately noted the disposition of the case. Instead of the file, however, the Hodges received a brief summary of the contents of the case file prepared by Katz. Later, Katz acknowledged that the Hodges' names were entered on the AMF.

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[1] All of the information on the computerized data base is in alphanumeric code. However, any legitimate user of the AMF would understand the meanings of those codes, and there is nothing in this record to indicate that an illegitimate user who could obtain unauthorized access to the AMF could not similarly obtain access to those codes. Therefore, the fact that the information on the AMF is in code is irrelevant.

[2] Because of the interrelation of the computerized data base and the physical case files, this Court hereafter will use the term "AMF" inclusively to describe both forms of information storage and retrieval in their entirety.

Skeptical of Katz' version of their case file and concerned over the implications of their inclusion on the AMF, the Hodges turned to Carolyn Colvin, Director of the Maryland Department of Human Resources ("MDHR"). Referring to the State confidentiality statute, Md.Code art. 88A, § 6, and its supporting regulations, COMAR 07.01.02, 07.02.07, Colvin also refused to disclose the contents of the case file to the Hodges.

The "AMF" and the "Central Registry"

At the direction of the Maryland Legislature, the State Department of Welfare, the predecessor to the Social Services Administration ("SSA") within MDHR, created the Central Registry for Child Abuse in 1966. Providing that "[MDHR] *shall* maintain a central registry of cases" of suspected child abuse, 1966 Md.Laws 469 (emphasis added), the Legislature noted its intent "to facilitate compliance with and enforcement of [the law] regarding the assaulting of children within the State." *Id.* at 466. The Legislature later provided for certain procedural safeguards in connection with the central registry, such as notice and an opportunity to be heard for any person named as a suspected child abuser. 1977 Md. Laws 2351-52.

In 1987, the Maryland Legislature consolidated its child abuse laws into Md.Fam.Law Code §§ 5-701 to

5-715. As part of that effort, the Legislature approved a measure proposed by MDHR to make the central registry requirement permissive rather than mandatory. *See* Md.Fam.Law Code § 5-714. Soon afterward, MDHR stopped adding records to the Central Registry for Child Abuse.

Meanwhile, however, in 1981 MDHR established the AMF, which, as noted above, is a comprehensive computerized data base that includes everyone in Maryland who has received "services" of any kind from any of the local DSS offices, including all children who receive CPS services. In a typical record of CPS services on the AMF, alphanumeric codes identify the names of child [sic] in the case, the child's parents or guardians, other members of the family, and still other persons associated with the family if those persons are child abusers or perpetrators of child abuse. Affidavit of Charles Bosley, ¶ 12.[3] Although thousands of individuals are listed on the AMF as "case associates" in connection with cases of CPS services, MDHR does not provide notice and an opportunity to be heard to any of those individuals.

In their complaint in this case, the Hodges assert that the individual defendants have knowingly and willfully denied the Hodges their basic rights of procedural due process in connection with the creation and maintenance of their case file on the AMF. Specifically, as individuals alleged to be child abusers in a case in which child abuse has been ruled out or otherwise found to be without any evidentiary basis, the Hodges assert the following "procedural due process rights":

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[3] At a hearing held on September 3, 1992, this Court denied the motion of the defendants to strike Bosley's affidavit. Rather than submit their own affidavits to counter Bosley's recollection concerning the AMF, the defendants have allowed the plaintiffs to configure the record in this case. *See Kelly v. United States*, 924 F.2d 355, 358 (1st Cir.1991).

> (a) to have complete access to, and the ability to copy or otherwise make an independent record of, all information contained in the [AMF] that relates to them so as to have timely and adequate notice of the charges against them and the evidence claimed to support those charges;
>
> (b) to have included in the [AMF], as an official part of the case-file, written information supplied by them or by their agents relevant to the incidents of alleged child abuse, so as to have timely and adequate opportunity to present evidence in defense;
>
> (c) to require that the CCDSS and the MDHR and their officials and employees, on the application of the Hodges, promptly correct or amend all misinformation contained in the [AMF], immediately reporting such corrections or amendations to the Hodges, or explaining in detail the agencies' refusal to make the requested corrections or amendments;
>
> (d) to require that the CCDSS, the MDHR, or both provide the Hodges with the opportunity, in a prompt administrative hearing, to challenge any findings, reports, or other conclusory statements of "abuse," and the refusal of the CCDSS or the MDHR to correct or amend misinformation, contained in the [AMF];

(e) to require that the CCDSS and the MDHR inform the Hodges of each request by any agency of local, state, or national government, or by any private party, that may result in the release thereto of any information contained in the [AMF], with

(i) a complete identification of the agency or party requesting the information;

(ii) specification of the information to be released; and

(iii) reference to the basis in statute or regulation for the release of such information to that agency or party, all of the foregoing to be provided a reasonable time before any such release may be made;

(f) to require that the CCDSS and the MDHR in no event release any information whatsoever contained in the [AMF] without including in the release materials a prominent certification that the alleged child abuse has been "RULED OUT," or otherwise found to be without legal or evidentiary basis;

(g) to require that CCDSS and the MDHR provide the Hodges with complete, accurate, and legible copies of all information contained in the [AMF] that has been released to anyone, immediately upon such release; and

(h) in as much as in the case of David R. Hodge and Martha A. Hodge the evidence adduced by the investigation provided no basis whatsoever for reasonable suspicion of child abuse to require that the CCDSS and the MDHR forthwith expunge

> (i) the names of David R. Hodge, Martha A. Hodge, and Joseph E. Hodge from any "central registry," "AMF," or functionally equivalent system of data-storage and data-retrieval;
>
> (ii) any and all records, documents, entries, data, or other written or otherwise recorded information and materials that refer in any way either to David R. Hodge and Marsha A. Hodge, whether as "alleged child abusers" as such or by any similar term, classification, description, or rubric; or to Joseph E. Hodge as a "victim of child abuse" as such or by any similar term, classification, description, or rubric; or to David R. Hodge, Marsha A. Hodge, or Joseph E. Hodge as recipients from the CCDSS of "services" as such or by any similar term, classification, description, or rubric; and
>
> (iii) any and all records, documents, entries, data, or other written or otherwise recorded information and materials that refer in any way to the alleged incident of child abuse involving Joseph E. Hodge.

Complaint, ¶ 51 (emphasis in original). The plaintiffs argue that these procedural due process rights exist in conjunction with their protected liberty and property interests in familial privacy, professional reputation, and the procedures established by Maryland law. Before reaching those interests, however, this Court will pause to review the applicable legal standards in this case.

42 U.S.C. § 1983

Section 1983 provides for the imposition of liability on any person who, acting under color of state law, deprives another of rights, privileges, or immunities secured by the Constitution or the laws of the United States. To state a claim under § 1983, the plaintiffs must show both (1) that the offending conduct was committed by a person acting under color of state law, and (2) that such conduct deprived the plaintiffs of rights secured by the Constitution or laws of the United States. *Parratt v. Taylor,* 451 U.S. 527, 535, 101 S.Ct. 1908, 1912-13, 68 L.Ed.2d 420 (1981), *overruled in part on other grounds, Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). The parties in this case agree that the individual defendants at all times acted "under color of state law."

Section 1983 " 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.' " *Graham v. Connor,* 490 U.S. 386, 393-94, 109 S.Ct. 1865, 1870, 104 L.Ed.2d 443 (1989) (quoting *Baker v. McCollan,* 443 U.S. 137, 144 U.S. 137, 144 n. 3, 99 S.Ct. 2689, 2694 n. 3, 61 L.Ed.2d 433 (1979)). In particular combination with the Due Process Clause of the Fourteenth Amendment, § 1983 allows plaintiffs to assert three kinds of federal claims: (1) claims for the deprivation by state officials of any of the specific protections defined in the Bill of Rights; (2) claims under the substantive component of the Due Process Clause relating to certain arbitrary wrongful government action; and (3) claims under the procedural component of the Due Process Clause relating to deprivations of life, liberty, or property without due process of law. *Zinermon v.*

Burch, 494 U.S. 113, 125, 110 S.Ct. 975, 983, 108 L.Ed.2d 100 (1990). Here, ¶ 51 of the complaint clearly sets out claims of the third variety listed above. In such a case, the first inquiry is whether the defendants deprived the plaintiffs of a protected liberty or property interest; if so, this Court must determine whether the process afforded to the plaintiffs conformed to the constitutional minimum under circumstances. *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538, 105 S.Ct. 1487, 1491, 84 L.Ed. 2d 494 (1985).

Familial Privacy

As one of the fundamental concepts in the Constitution, the term "liberty" broadly encompasses interests more far-reaching than mere freedom from bodily restraint. *Board of Regents v. Roth,* 408 U.S. 564, 572, 92 S.Ct. 2701, 2706, 33 L.Ed.2d 548 (1972) (citing *Meyer v. Nebraska,* 262 U.S. 390, 399, 43 S.Ct. 625, 626-27, 67 L.Ed. 1042 (1923)). Nevertheless, the term does not extend limitlessly to every conceivable individual interest that might impinge on one's pursuit of happiness in a free society, *Roth,* 408 U.S. at 569-70, 92 S.Ct. at 2705, but instead derives meaning from "existing rules or understandings that stem from an independent source such as state law." *Id.* at 577, 92 S.Ct. at 2709; *see also Paul v. Davis,* 424 U.S. 693, 710-11 96 S.Ct. 1155, 1165-66, 47 L.Ed.2d 405 (1976).

For many years, courts have recognized that the Due Process Clause encompasses a broad right of personal privacy. *Whalen v. Roe,* 429 U.S. 589, 598-600, 97 S.Ct. 869, 876, 51 L.Ed.2d 64 (1976) (recognizing an "individual interest in avoiding disclosure of personal matters," and an "interest in independence in making certain kinds of important decisions"); *Fadjo v. Coon,* 633 F.2d 1172, 1175 (5th Cir.1981) (privacy interest extends to information gathered during criminal investigation); *United States v. Westinghouse Elec. Corp.,* 638 F.2d 570, 577 (3rd Cir.1980) (privacy interest extends to medical records). Further, courts have acknowledged that such a right embraces interests in familial privacy. *See, e.g., Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. 816, 842, 97 S.Ct. 2094, 2108, 53 L.Ed.2d 14 (1977) (due process clause protects 'private realm of family life which the state cannot enter' (quoting *Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944))); *Bohn v. County of Dakota,* 772 F.2d 1433, 1435-36 (8th Cir.1985) (familial privacy in context of parent identified as suspected child abuser).

Analogizing to the protected liberty interest in personal privacy acknowledged by the Supreme Court, the protected liberty interest in familial privacy encompasses an "interest in avoiding disclosure of personal matters." *Whalen,* 429 U.S. at 599, 97 S.Ct. at 876. That interest, also described as a "right to confidentiality," *Fadjo,* 633 F.2d at 1175 (quoting *Plante v. Gonzalez,* 575 F.2d 1119, 1132 (5th Cir. 1978)), is implicated when government shares private information or when government collects private information in the absence of any legitimate state interest for such collection. *Fadjo,* 633 F.2d at 1175.

After an investigation found "substantial evidence" of child abuse, the plaintiffs in *Bohn* filed suit under § 1983 claiming a deprivation of their rights to familial privacy. On the issue of whether the parents sufficiently had asserted a protected liberty interest in familial privacy to survive a motion to dismiss, the United States Court of Appeals for the Eighth Circuit Court of Appeals for the Eighth Circuit wrote:

> The privacy and autonomy of familial relationships involved in a case like this are unarguably among the protectible [sic] interests which due process protects. We can conceive of no more important relationship, no more basic bond in American society, than the tie between parent and child.

Bohn, 772 F.2d at 1435-36. Echoing those sentiments, this Court holds that the Hodges collectively enjoy a protected liberty interest in familial privacy.

The question that confronts this Court, however, is whether the actions of the individual defendants have deprived the Hodges of that protected interest without due process of law. The Hodges concede that CCDSS must investigate reported incidents of suspected child abuse; such an investigation necessarily involves some contact with individuals other than the Hodges themselves, including neighbors and members of the Hodges' extended family. The Hodges further concede that CCDSS must maintain records of child abuse investigations to the extent necessary to further the compelling governmental interest in protecting children from pedophiles and other abusers. Thus, the deprivation of familial privacy alleged by the Hodges in this case resulted only when the individual defendants maintained the Hodges' case file as part of the AMF even after any reasonable suspicion of child abuse had been ruled out.

This Court must utilize the three-part test announced by the Supreme Court in *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), where the Court explained that

> identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335, 96 S.Ct. at 903. As noted above, the very substantial interest in familial privacy extends to the collection by the government of information that relates to child abuse. Further, because CCDSS includes on the AMF even those records of CPS services where child abuse has been ruled out, the deprivation of that interest in a case such as the Hodges' is assured. Finally, this Court cannot imagine that much expense or inconvenience could result from a requirement that CCDSS expunge records of CPS services where child abuse is ruled out, rather than maintaining those records on the AMF; on the facts presently in the record, there is no evidence to indicate that such expungement would impose any burden at all on the defendants.

In the absence of additional or substitute safeguards, the Hodges' case file would remain on the AMF until

January 1994.[4] Given the "[p]roliferation in the collection, recording, and dissemination of individualized information" and the "ability of governmental officials to put information technology to uses detrimental to individual privacy, . . . facilitated by the spread of data banks and by the increasing storage in computers of sensitive information relating to the personal lives and activities of private citizens," *Westinghouse Elec. Corp.*, 638 F.2d at 576, keeping such information for such an extended period of time requires that the government have a legitimate interest in collecting that information. In this case, the defendants have failed to assert any legitimate governmental interest in maintaining the Hodges' case file on the AMF. As noted above, CCDSS has no use for the Hodges' case file as a tool for tracking children who are victims of repeated suspicious injuries, because Joseph Hodge suffered from a bone infection, not a suspicious injury. Further, efforts to prevent harassment or repeatedly false accusations do not require personal information regarding the *victims* of such attacks. Finally, although CCDSS certainly has a legitimate governmental interest in compiling statistical data relating to CPS services, such data need not contain any information specific to the Hodges.

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[4] In January 1989, Maryland law provided:

> The local department shall expunge a report of suspected child abuse or neglect 5 years after the date of the report if:
>
> (1) the investigation . . . concludes that the report is unsubstantiated; and
>
> (2) no further reports of abuse or neglect are received during the 5 years.

Md.Fam.Law Code § 5-707(b). The defendants interpreted § 5-707(b) to require them to maintain records of cases of suspected child abuse for 5 years.

The Hodges also allege that CCDSS has shared their case file with other agencies and even with members of the press, and they assert a right to control access to their case file. Complaint, ¶ 51(e)-(g). Although the plaintiffs' substantial interest in familial privacy favors such control, additional safeguards of the kind proposed by the Hodges would create huge administrative and fiscal burdens for the State, with only minimal benefit for the Hodges. This Court finds that the current safeguards, including criminal sanctions for the improper disclosure of confidential information, adequately limit access to the information. Finally, the overriding state interest in using the information on the AMF to further the governmental interest in protecting children tips the balance against parental oversight; CCDSS certainly may share properly maintained records with other agencies in order to further that interest.

For over three years, the defendants have maintained a CPS case file on the Hodges with no legitimate justification for doing so. Under the circumstances, and in light of the evidence in the record, this Court concludes that the Hodges have stated a claim under § 1983 for deprivation of their protected liberty interest in familial privacy without due process of law.

Professional Reputation

The plaintiffs also assert that the defendants deprived them of their protected liberty interest in professional reputation by maintaining their case file on the

AMF. In support of their motion, the individual defendants argue that their actions do not rise to the level of a constitutionally cognizable deprivation of the Hodge's professional reputation.

In *Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), the plaintiff, who had been arrested for shoplifting, argued that the distribution of a flyer to local businesses that labelled him as an "active shoplifter" deprived him of liberty without due process of law. The Court in that case held that any state-inflicted injury to the plaintiff's reputation did not implicate the protections of the Due Process Clause because applicable state law did not guarantee present enjoyment of reputation. *Id.* at 711-12, 96 S.Ct. at 1165-66.

The adult Hodges argue that, because they hold national security clearances in connection with their jobs, and because those clearances regularly are subject to review without notice, and because allegations of child abuse certainly would have a negative impact on such a review, the actions of the defendants have harmed them in a tangible way. This Court disagrees. First, national security clearances themselves are not a form of property protected by Due Process Clause. *Jamil v. Secretary, Department of Defense,* 910 F.2d 1203, 1209 (4th Cir.1990) (citing *Department of Navy v. Egan,* 484 U.S. 518, 528, 108 S.Ct. 818, 824, 98 L.Ed.2d 918 (1988)). Second, the plaintiffs seek to transform an action for defamation under the common law into a federal claim under § 1983, a tactic that the Supreme Court expressly has disapproved. *Paul,* 424 U.S. at 712, 96 S.Ct. at 1166 ("petitioner's defamatory publications, however seriously they may have harmed respondent's reputation, did not deprive him of any 'liberty' or 'property' interests protected by the Due Process Clause").

Citing *Weller v. Department of Social Services*, 901 F.2d 387 (4th Cir.1990), the plaintiffs argue that the Fourth Circuit has recognized a protected interest under the Due Process Clause in one's reputation as a child abuser. *Id.* at 392-93 (citing *Bohn*, 772 F.2d 1436 n. 4). In that case, however, the Fourth Circuit determined that "[t]he issue need not be decided," *id.* at 393, and the *obiter dicta* in that court's opinion does not require this Court to disregard well-established Supreme Court precedent.

In this case, the adult Hodges have failed to show any tangible deprivation under Maryland law in connection with their reputations "because of what the government is doing to [them]." *Paul*, 424 U.S. at 708, 96 S.Ct. at 1164 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971)). Accordingly, the Hodges have failed to state a claim under § 1983 based on any such deprivation.[5]

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[5] Without commenting on the merits of a defamation claim, this Court notes that, upon unsealing the Hodges' CPS case file, it was discovered that between January 23, 1989, and January 21, 1992, the alphanumeric codes on the computerized data base component of the AMF described the Hodges' case as one of indicated sexual child abuse, meaning that the CCDSS investigation discovered "credible and specific evidence, which has not been satisfactorily refuted," showing either that "[s]exual abuse had occurred and was committed by a caretaker or household or family member," or that "[t]here are physical or behavioral indications that a child has been sexually abused. . . . *see* COMAR 07.02.07.08B(1). There is no evidence yet in the record

Established State Procedure

The third protected liberty interest asserted by the Hodges in support of their complaint arises from Maryland's procedural guidelines for the entry of cases of suspected child abuse onto a central registry. Md.Fam.Law Code § 5-715. In support of their motion, the individual defendants argue first, that the AMF is *not* a central registry, and second, that violations of state law do not support actions under § 1983.

Applicable regulations define "central registry" as "a registry of all reported cases of suspected child abuse and neglect maintained in the Social Services Administration." COMAR 07.02.07.02B(1). Because the AMF is a comprehensive data base containing *all* of the cases handled by the local DSS offices, the AMF certainly includes the subset of "all reported cases of suspected child abuse." Indeed, such cases are distinguished on the AMF from other cases by alphanumeric codes, so that a person using the AMF readily can distinguish between records of CPS services and records of other kinds of services. Moreover, to the extent that one considers the contents of the physical case files as an integral part of the overall data base, records of CPS services become even more easily identifiable.

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to indicate who changed the computer records to reflect the proper disposition of the Hodges' case, or why three years passed before such a change was made. In any event, the state of the information on the AMF relates more to a common law claim for defamation than a constitutional claim for deprivation of liberty and property without due process of law. This is *not* a defamation case.

The individual defendants insist that the AMF is not a central registry because it is not a system designed solely to list the names of adjudicated child abusers, and because it does not identify any persons as a suspected child abuser. Given the plain language of COMAR 07.02.07.02B(1), however, that argument apparently confuses the general term "central registry" with the specific Central Registry for Child Abuse. Clearly, any computerized data base that includes records of cases of suspected child abuse is a "central registry" under Maryland law. Of course, the Central Registry for Child Abuse is an example of a "central registry." Similarly, the AMF also is a "central registry."

Justifiably concerned about the civil rights implications of a central registry containing records of all reported cases of suspected child abuse, the Maryland Legislature established a set of procedural safeguards in 1977 to protect individuals suspected of child abuse:

> **(b) Notice of entry of name in central registry.** – Before the name of a person who is suspected of abuse or neglect is entered in the central registry, the person shall be given notice.
>
> **(c) Hearing to appeal entry of name in central registry required; exception. –**
>
> (1) Except as provided in paragraph (3) of this subsection, on request by a person suspected of abuse or neglect, the Department shall hold an administrative hearing for the purpose of allowing the person to appeal the entry of the person's name in the central registry.

> (2) The hearing shall be held in the county in which the person suspected of abuse or neglect resides.
>
> (3) The name of a person adjudicated a child abuser may be entered in the central registry without an opportunity for a hearing under this subsection.
>
> **(d) Requirements for entry of name in central registry.** – The Department may not enter the name of a person in the central registry unless the person has:
>
> > (1) been adjudicated a child abuser;
> >
> > (2) unsuccessfully appealed the entry of the person's name in the central registry under procedures established by the Department and this section; or
>
> (3) failed to respond within 15 days to notice by the Department of the Department's intent to enter the person's name in the central registry.

Md.Fam.Law Code § 5-715. In this case, the individual defendants clearly failed to provide notice and a hearing to the Hodges before including their names on the AMF.

The defendants argue that if the AMF were a central registry, then § 5-715 would require notice and a hearing before adding each and every record to the AMF. Because the Legislature could not have intended the absurd result of notice and a hearing in cases of, *e.g.*, food stamp services, the defendants argue, the AMF cannot be a central registry. However, this Court finds even more absurd the notion that the defendants could avoid the clear requirements of § 5-715 simply by adding other sorts of records to a central registry. However, § 5-715 has nothing to do with any sort of record other than records of cases of suspected child abuse. The Legislature enacted § 5-715 as part of an Act devoted entirely to the problems of child abuse and neglect. 1977 Md.Laws 2942-55. Moreover, § 5-715 appears on the books as part of a subtitle of Maryland law relating exclusively to child abuse and neglect, within a title devoted to children. Finally, the definition of central registry in COMAR 07.02.07.02B(1) does not include any records other than records of cases of suspected child abuse. Consequently, this Court's holding should be understood to distinguish between those records on the AMF that concern cases of suspected child abuse and records of other forms of DSS services.

The defendants further argue that because the AMF does not identify any persons as "suspected child abusers," the AMF is not a central registry and § 5-715 does not apply. Under Maryland law, however, the AMF *is* a central registry. Additionally, with regard to the defendants' initial position, exactly the opposite conclusion follows from the facts presently in the record. CCDSS provides CPS services only in cases of suspected child abuse. *See* COMAR 07.02.07.03A. Further, applicable regulations define "child abuse" generally as physical injury or sexual molestation inflicted on a child either by a parent or by a guardian. COMAR 07.02.07.02B(3). Therefore, every record of CPS services on the AMF is a record of a case of suspected child abuse. Indeed, several of the documents in the Hodges' physical case file labelled "Report of Suspected Child Abuse" leave no doubt about the nature of Loper's investigation in this case. Finally, even in a record of "unsubstantiated" child abuse, it requires no great leap of faith to conclude that at least one of the parents or guardians listed in the record is suspected of child abuse, regardless of whether the record identifies them explicitly in that way, and the plaintiffs have submitted affidavits from several former DSS employees to support such a conclusion.

With respect to the defendants' other argument, "it is well settled that violations of state law cannot provide the basis for a due process claim." *Weller v. Department of Social Services*, 901 F.2d 387, 392 (4th Cir.1990). However, where state officers deprive an individual of a protected liberty or property interest in accordance with established state procedures, one may attack those procedures as violative of the Due Process Clause. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982).

In *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) and *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), the Supreme Court explained that where a state official's random and unauthorized actions result in a deprivation of a protected liberty or property interest, adequate postdeprivation remedies provided by the State would satisfy the requirements of due process, even where the state official acted intentionally. *Hudson*, 468 U.S. at 533, 104 S.Ct. at 3203. In contrast, an "established state procedure" resulted in the deprivation at issue in *Logan*, and the Court in that case held that postdeprivation remedies would not suffice, and that the plaintiff could challenge the state procedure. *Logan*, 455 U.S. at 436, 102 S.Ct. at 1158 ("Logan is challenging not the Commission's error, but the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards").

In the case at bar, the individual defendants deprived the plaintiffs of their protected interest in familial privacy by placing into the AMF a record of the Hodges' case in the absence of any legitimate state interest in maintaining such a record. That deprivation occurred pursuant to an established state procedure that refuses to recognize the AMF as a central registry or to accord to persons suspected of child abuse the procedural safeguards contained in § 5-715. The only postdeprivation remedy available to the plaintiffs comes in the form of expungement after their record has remained on the AMF for five years; in light of the nature of the deprivation, this Court finds such a remedy wholly inadequate. The procedures contained in § 5-715 have indisputable value in discovering and preventing unwarranted deprivations such as the one at issue in this case. Finally, although requiring notice and a hearing before placing a person's name on a central registry will lead to a significant fiscal and administrative burden on the State, "it is at least awkward to find that procedures the state, through its legislative body, has imposed upon itself would be unduly burdensome for the state." *Riccio v. County of Fairfax, Virginia,* 907 F.2d 1459, 1468 (4th Cir.1990). Accordingly, this Court holds that the plaintiffs have stated a claim under § 1983 based on the defendants' refusal to comply with the procedural requirements of § 5-715.

Paragraph 51

Having discussed at some length the protected liberty and property interests involved in this case, this Court briefly will examine the plaintiffs' asserted "procedural due process rights" contained in the complaint at ¶ 51 and evaluate each of those in light of the foregoing analysis. Such an examination will help to clarify this Court's holdings by illustrating the contours of the protected liberty and property interests allegedly deprived by the defendants.

The first of the asserted rights reads:

> to have complete access to, and the ability to copy or otherwise make an independent record of, all information contained in the [AMF] that relates to [the Hodges], so as to have timely and adequate *notice* of the charges against them and the evidence claimed to support those charges;

Complaint, ¶ 51(a) (emphasis in original). Although § 5-715 provides for notice of the charges of child abuse, neither the plaintiffs' interest in familial privacy nor their challenge to the established state procedure of refusing to recognize the AMF as a central registry support the plaintiffs' asserted right of complete access to the information contained in the AMF. Thus, except for notice as provided in § 5-715, this Court rejects the plaintiffs' first asserted right.

> Next, the plaintiffs assert a right to have included in the [AMF], as an official part of the case-file, written information supplied by them or by their agents relevant to the incidents of alleged child abuse, so as to have timely and adequate opportunity to present *evidence in defense;*

Complaint ¶ 51(b) (emphasis in original). Although § 5-715 does not provide for an opportunity to present evidence, regulations promulgated by MDHR allow for the presentation of documentary evidence and oral argument at a hearing conducted under § 5-715. COMAR 07.02.02.07C. Except to the extent that the plaintiffs challenge the established state procedure of refusing to comply with § 5-715 in connection with the AMF, however, nothing about the plaintiffs' interest in familial privacy or their procedural challenge would support a right to add written material to their CPS case file at any other time.

> The plaintiffs also assert a right to require that the CCDSS and the MDHR and their officials and employees, on the application of the Hodges, promptly correct or amend all misinformation contained in the [AMF], immediately reporting such corrections or amendations to the Hodges, or explaining in detail the agencies' refusal to make the requested corrections or amendments;

Complaint ¶ 51(c). Apparently relying on the existence of a protected interest in professional reputation, the plaintiffs assert this right as part of an effort to ensure that the AMF contains only information that they approve. Of course, as this Court already has noted, no such protected interest exists to support such an asserted right. Accordingly, this Court rejects the plaintiffs' third asserted procedural due process right.

> Fourth, the plaintiffs assert a right to require that the CCDSS, the MDHR, or both provide the Hodges with the opportunity, in a prompt administrative *hearing,* to challenge any findings, reports, or other conclusory statements of

> "abuse," and the refusal of the CCDSS or the MDHR to correct or amend misinformation, contained in the [AMF];

Complaint ¶ 51(d) (emphasis in original). Here, the plaintiffs combine the hearing requirement of § 5-715 with a right to appeal to enforce the third asserted procedural due process right, which this Court has rejected above. Because only the former element of this asserted right relates to the Hodges' protected interest in familial privacy and their challenge to the established state procedures that led to the alleged deprivation of that interest, this Court will reject the latter part of this asserted right

In their fifth, sixth, and seventh asserted procedural due process rights, the plaintiffs claim a right

> to require that the CCDSS and the MDHR inform the Hodges of each request by any agency of local, state, or national government, or by any private party, that may result in the release thereto of any information contained in the [AMF], with
>
> > (i) a complete identification of the agency or party requesting the information;
> > (ii) specification of the information to be released; and
> > (iii) reference to the basis in statute or regulation for the release of such information to that agency or party, all of the foregoing to be provided a reasonable time before any such release may be made;
>
> to require that the CCDSS and the MDHR in no event release any information whatsoever contained in the [AMF] without including in the

> release materials a prominent certification that the alleged child abuse has been "RULED OUT," or otherwise found to be without legal or evidentiary basis; [and]
>
> to require that CCDSS and the MDHR provide the Hodges with complete, accurate, and legible copies of all information contained in the [AMF] that has been released to anyone, immediately upon such release;

Complaint ¶ 51(e)-(g). Like the third asserted right above, these asserted rights closely relate to the adult Hodges' claimed protected interest in their professional reputations, which this Court holds does not exist. These asserted rights do not relate to the established state procedure challenged by the plaintiffs in this case. Finally, as noted above, although the sharing of information contained in the Hodges' case file implicates their protected interest in familial privacy, a balancing of interests reveals that the Hodges have received all of the process that is due in that regard. Emphasizing that the adult Hodges may not use the Due Process Clause of the Fourteenth Amendment to vindicate their reputations, this Court rejects these asserted procedural due process rights.

Finally, the plaintiffs assert a right

> inasmuch as in the case of David R. Hodge and Martha A. Hodge the evidence adduced by the investigation provided no basis whatsoever for reasonable suspicion of child abuse, to require that the CCDSS and the NDHR [sic] forthwith expunge

> (i) the names of David R. Hodge, Martha A. Hodge, and Joseph E. Hodge from any "central registry," "AMF," or functionally equivalent system of data-storage and data-retrieval;
> (ii) any and all records, documents, entries, data, or other written or otherwise recorded information and materials that refer in any way either to David R. Hodge and Marsha A. Hodge, whether as "alleged child abusers" as such or by any similar term, classification, description, or rubric; or to Joseph E. Hodge as a "victim of child abuse" as such or by any similar term, classification, description, or rubric; or to David R. Hodge, Marsha A. Hodge, or Joseph E. Hodge as recipients from the CCDSS of "services" as such or by any similar term, classification, description, or rubric; and
> (iii) any and all records, documents, entries, data, or other written or otherwise recorded information and materials that refer in any way to the alleged incident of child abuse involving Joseph E. Hodge.

Complaint ¶ 51(h). Falling four-square within the scope of the plaintiffs' claim for deprivation of their protected interest in familial privacy, this last claim remains part of this case. Now this Court will address the last of the arguments raised by the individual defendants in support of their motion.

C. *Qualified Immunity*

Qualified immunity acknowledges that subjecting public officials with discretionary functions to insubstantial lawsuits burdens not only the defendant officials, but society as a whole. *Harlow v. Fitzgerald,* 457 U.S. 800, 814, 102 S.Ct. 2727, 2736, 73 L.Ed. 2d 396 (1982). Balanced against that concern, however, is the recognition that, "[i]n situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow,* 457 U.S. at 814, 102 S.Ct. at 2736; *see Butz v. Economou,* 438 U.S. 478, 506, 98 S.Ct. 2894, 2910-11, 57 L.Ed. 2d 895 (1978) ("it is not unfair to hold liable the official who knows or should know he is acting outside the law") (citing *Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)). Accordingly, public officials enjoy qualified immunity from liability under § 1983 unless their actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow,* 457 U.S. at 818, 102 S.Ct. at 2738. In other words, "in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton,* 483 U.S. 635, 638, 107 S.Ct. 3034, 3038, 97 L.Ed.2d 523 (1987). Finally, the defense of qualified immunity does not shield public officials from liability in their official capacities, but only in their individual capacities. *Kentucky v. Graham,* 473 U.S. 159, 166-67, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985).

As noted above, the plaintiffs in this case have stated a claim against the individual defendants under § 1983 for the deprivation of the plaintiffs' protected liberty and property interests in familial privacy and in the procedures established by Maryland law. With regard to the first of those interests, not only was the existence of a protected interest in familial privacy "clearly established" in January 1989, when CCDSS first learned that Joseph Hodge could not possibly have suffered child abuse, but the Supreme Court in 1977 noted that "[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. East Cleveland, Ohio,* 431 U.S. 494, 503, 97 S.Ct. 1932, 1937-38, 52 L.Ed.2d 531 (1977); *see also Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. 816, 842, 97 S.Ct. 2094, 2108-09, 53 L.Ed.2d 14 (1977) (acknowledging the existence of a 'private realm of family life which the state cannot enter') (quoting *Prince v. Massachusetts,* 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944)). Similarly, the Eighth Circuit in 1985 recognized that collecting information relating to suspicions of child abuse implicated the "privacy and autonomy of familial relationships." *Bohn,* 772 F.2d at 1435.

Equally "clearly established" in January 1989 were the procedural safeguards set out in Md.Fam.Law Code § 5-715 and its supporting regulations governing the inclusion of records of cases of suspected child abuse on the central registry. To the extent that the individual defendants in this case disregarded those procedures as part of an "established state procedure," the plaintiffs may assert their claims in this case.

The individual defendants argue that they made every effort in good faith to comply with Maryland law, and that therefore they enjoy qualified immunity in this case. However, the proper inquiry for qualified immunity in this case is whether the individual defendants reasonably complied with federal law, not state law. Obviously, compliance with state law cannot absolve a public official of liability in connection with the deprivation of clearly established rights under the Constitution.

D. *Conclusion*

Before leaving the defendants' motion to dismiss or for summary judgment and considering the plaintiffs' counterpart motion, this Court will review its holding. On the grounds of Eleventh Amendment immunity, this Court will dismiss CCDSS from the case. After careful consideration of the record in this case, this Court concludes that the plaintiffs have stated a claim under § 1983 based on the alleged deprivation of their protected interest in familial privacy and in connection with their challenge to the established state procedure refusing to recognize the AMF as a central registry within the meaning of § 5-715. Finally, this Court rejects the argument that the individual defendants enjoy qualified immunity to liability in their individual capacities. Indeed, taking all of the evidence in this case in the light most favorable to the plaintiffs, the unlawfulness of the defendants' actions was clearly apparent. *See Anderson v. Creighton*, 483 U.S. at 638, 107 S.Ct. at 3038.

II. MOTION FOR INTERLOCUTORY SUMMARY JUDGMENT

Having declined either to dismiss the complaint or to grant summary judgment in favor of the defendants, this Court now will consider the motion of the plaintiffs for interlocutory summary judgment as to the liability of the individual defendants. For the purposes of this motion, of course, the tables are turned; this Court must construe the evidence and reasonable inferences drawn therefrom in the light most favorable to the *defendants*, and any genuine issues of material fact raised by the defendants will defeat the plaintiffs' motion.

However, the defendants must proffer more than "a mere scintilla of evidence" in opposition to the motion. *Anderson v. Liberty Lobby,* 477 U.S. at 252, 106 S.Ct. at 2512. While not weighing the evidence or determining the truth for the purposes of this motion, this Court must ask "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 249, 252, 106 S.Ct. at 2510-12.

The plaintiffs argue that the undisputed facts in the record in this case demonstrate that the defendants deprived the Hodges of liberty and property without due process of law when they entered the record of the Hodges' case file onto the AMF without notice or a hearing. The Hodges ground their request for summary judgment on their protected interest in familial privacy and on their challenge to the established state procedure refusing to recognize the AMF as a central registry.[6]

With respect to the alleged deprivation of familial privacy, the undisputed facts indicate that the defendants maintained the Hodges' case file on the AMF even after reaching the conclusion that Joseph could not have been the victim of child abuse. As discussed at length above, the deprivation occurred without due process of law, in that no legitimate state interest supported maintaining the Hodges' case file after the true nature of Joseph's condition was discovered. The defendants have failed to present any evidence to raise any genuine issues of material fact in connection with that issue. Accordingly, this Court will grant the plaintiffs' motion for interlocutory summary judgment in connection with the deprivation of the Hodges' protected interest in familial privacy.

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[6] The adult Hodges also assert an interest in professional reputation, but as noted above, this Court holds that the Due Process Clause of the Fourteenth Amendment does not protect such an interest in this case.

With regard to the plaintiffs' challenge to the established state procedure of refusing to recognize the AMF as a central registry, the defendants have submitted a number of affidavits to support their claim that the AMF is not a central registry under Maryland law. However, those affidavits typically contain only conclusory statements. *See* Affidavit of David R. Hodge, Ex. AI (affidavit of Linda Heisner, an official at SSA, in which she asserts that "[i]n practice, no central registries exist today, nor have they since 1986").[7] The defendants have submitted no otherwise admissible evidence that would support an inference that the AMF is *not* a registry containing the records of cases of suspected child abuse. *See* COMAR 07.02.07.02B(1)

Moreover, the defendants have not raised a genuine issue of material fact in connection with the issue of whether persons listed on the AMF are "suspected child abusers," especially in the face of the affidavits of Charles

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[7] The parties disagree as to the evidentiary value of Heisner's affidavit. To the extent that the affidavit contains sworn statements made upon the personal knowledge of a competent witness, however, the affidavit complies with the requirements of Rule 56(e). Accordingly, this Court concludes that the defendants may rely on the Heisner affidavit.

Bosley, Cassandra Hillmon, and Selena Thomas, submitted by the plaintiffs to support their position on that issue. Based on the evidence presently in the record, this Court finds that no reasonable jury could conclude that the AMF does not list the names of suspected child abusers. Accordingly, this Court will grant the plaintiffs' motion for interlocutory summary judgment in connection with their challenge to the established state practice of refusing to comply with § 5-715 in connection with the AMF.

III. CONCLUSION

In January 1989, the Hodges brought their three-month-old son into the hospital for treatment of a bone infection. Because of a misdiagnosis, CCDSS conducted an investigation. Although child abuse was ruled out to a medical certainty, and despite the procedural requirements of Md.Fam.Law Code § 5-715, CCDSS placed a record of the Hodges' case into the AMF, a central registry of cases of suspected child abuse, without notifying the Hodges or affording them an opportunity for a hearing. Today, this Court holds that the entry of that case file onto the AMF, and the established state procedure that facilitated the entry, deprived the Hodges of their protected interest in familial privacy without due process of law. This Court will execute an Order on this date in accordance with the foregoing Memorandum.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

DAVID R. HODGE, ET AL.	:	
V.	:	CIVIL NO.
	:	HM-92-155
CARROLL COUNTY	:	
DEPARTMENT OF SOCIAL	:	
SERVICES, ET AL.	:	

ORDER

In accordance with the Memorandum issued on this date in the above-captioned case, it is this 21st of September, 1992 by the United States District Court for the District of Maryland,

ORDERED:

(1) that the motion of the defendants, Carroll County Department of Social Services, M. Alexander Jones, Alan Katz, and Carolyn Colvin, to dismiss or in the alternative for summary judgment be, and the same hereby is, *Granted in Part* and *Denied in Part;*

(2) that the motion of the plaintiffs, David R. Hodge and Marsha A. Hodge, individually and on behalf of their son, Joseph E. Hodge, for interlocutory summary judgment be and the same hereby is, *Granted;* and

(3) that the Clerk of the Court shall mail a copy of the Memorandum and Order to all of the parties.

/s/ Herbert F. Murray
Senior United
States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

DAVID R. HODGE, ET AL. :
V. : CIVIL NO.
: HM-92-155
CARROLL COUNTY :
DEPARTMENT OF SOCIAL :
SERVICES, ET AL. :

MEMORANDUM

Despite unmistakable evidence that showed conclusively that the plaintiffs, David and Marsha Hodge, had not abused their child, Joseph Hodge, in any manner whatsoever, the defendants, the Carroll County Department of Social Services ("CCDSS"), M. Alexander Jones, Director of CCDSS, Alan Katz, Assistant Director of CCDSS, and Carolyn Colvin, Director of the Maryland Department of Human Relations ("MDHR"), kept a record of the case on the Automated Master File, ("AMF"), a statewide comprehensive computerized database containing, *inter alia,* records of cases of suspected child abuse. By a Memorandum and Order dated September 21, 1992, this Court dismissed CCDSS from the case, granted in part and denied in part the remainder of the motion of the defendants to dismiss or for summary judgment, and granted the plaintiffs' motion for interlocutory summary judgment on the issue of liability. Presently pending before this Court are the cross-motions of the parties to alter or amend that judgment.

I. MOTIONS UNDER RULE 59(e)

Although in their motions the parties fail to address the standards governing motions to alter or amend judgment under Rule 59(e) of the Federal Rules of Civil Procedure, this Court briefly will survey the law in that field. In appropriate cases, a motion under Rule 59(e) invites the court to revisit its prior rulings under any one of three permissible grounds: an intervening change in controlling law; new evidence previously unavailable; or the need to correct a clear error of law or prevent manifest injustice. *Natural Resources Defense Council v. United States E.P.A.*, 705 F. Supp. 698, 702 (D.D.C 1989), *vacated on other grounds*, 707 F. Supp. 3 (D.D.C. 1989). In this case, neither party seeks review under either of the first two grounds; instead, the defendants assert that this Court repeatedly erred as a matter of law, while the plaintiffs seek to clarify the terms of the Memorandum dated September 21, 1992, by means of a broadly worded amendment.

The decision to reexamine the judgment for alteration or amendment is committed to the sound discretion of the trial court. *Doe v. Heckler*, 580 F. Supp. 1224, 1227 (D. Md. 1984). In the exercise of that discretion, this Court may refuse to consider previously unraised arguments, *Seamon v. Vaughan*, 921 F.2d 1217, 1220 (11th Cir. 1990), or to permit relitigation of matters already decided. *United States v. Western Elec. Co., Inc.*, 690 F. Supp. 22, 25 (D.D.C. 1988).

Having reviewed these principles, this Court now will proceed to a close examination of the pending motions.

II. DEFENDANTS' MOTION TO ALTER OR AMEND

In their motion, the defendants assert that this Court erred in four rulings of law. Specifically, the defendants argue first, that the facts in this case do not implicate the Hodges' right to familial privacy; second, that the facts in this case do not implicate Md. Fam. Law Code Ann. § 5-715; third, that the defendants enjoy qualified immunity; and fourth, that this Court erroneously granted summary judgment in favor of the plaintiffs despite the existence of genuine issues of material fact. This Court will consider each of those assertions in turn.

A. Familial Privacy

The defendants do not deny that the Due Process Clause of the Fourteenth Amendment protects a broad liberty interest in familial privacy, closely analogous to personal privacy, which includes a strong interest in avoiding the disclosure of personal matters, an interest sometimes described as a "right to confidentiality." The collection and maintenance by the government of highly personal and private information, such as information relating to child abuse investigations, implicates that interest. Accordingly, when it collects and maintains such volatile information, the government must take care not to deprive families of their protected interests, for example, by ensuring against improper disclosure of that information to the general public.

Conceding that common ground, the defendants argue that this Court erred when it held that maintaining information relating to the Hodges' case deprived the plaintiffs of their protected liberty interest in familial privacy. Essentially, the defendants argue that the government may maintain records of private information, even in the absence of any legitimate need for that information, so long as the information remains confidential and undisclosed to the general public.

In support of that argument, the defendants rely heavily on the decision of the United States Supreme Court in *Whalen v. Roe,* 429 U.S. 589 (1977). The plaintiffs in *Whalen,* users and prescribers of Schedule II pharmaceuticals, challenged a New York statutory scheme that provided for the collection and maintenance in a computerized database of records that, *inter alia,* identified users and prescribers of such drugs. Reversing the district court and upholding the scheme, the Court in *Whalen* emphasized two points: first, that New York confidentiality law expressly provided for a criminal penalty in the event of improper disclosure of information to the general public; and second, that collecting and maintaining such records furthered the legitimate governmental objective of monitoring the valid medical use of Schedule II drugs and controlling the improper use of those drugs.

The Court carefully considered the plaintiffs' argument that their protected privacy interests were deprived simply by the maintenance of the records, *i.e.,* the disclosure of the information in those records only to those governmental employees authorized under the confidentiality laws to access the information. Rejecting that argument, the Court wrote:

> Unquestionably, some individuals' concern for their own privacy may lead them to avoid or to postpone needed medical attention. Nevertheless, disclosures of private medical information

> to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient. Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.

Whalen, 429 U.S. at 602 (footnote omitted). By qualifying the last sentence with the word "automatically," the Court announced that, *even where confidentiality laws limit access to government records,* the maintenance of records of private information by the government could result in a deprivation of privacy. Clearly, the decision in *Whalen* does not afford the defendants the comfort that they seek.

The holding in *Whalen* raises the question: when would merely maintaining records of private information offend the right to confidentiality? The answer is unremarkable: when the government has no legitimate purpose for maintaining the private information in those records.

Reassuringly, few courts have considered the claim that government has collected and maintained records of private information in the absence of any legitimate need for that information, perhaps because the proposition against such a practice is so basic. In *United States v. Westinghouse Elec. Corp.,* 638 F.2d 570 (3rd Cir. 1980), the United States Court of Appeals for the Third Circuit recognized the fundamental logic supporting the rule that private information should remain protected until "the government has advanced a need to acquire the information." *Id.* at 578. *See also id.* ("In the cases in which a court has allowed some intrusion into the zone of privacy surrounding medical records, it has usually done so only after finding that the societal interest in disclosure outweighs the privacy interest on the specific facts of the case").

In *Fadjo v. Coon,* 633 F.2d 1172 (5th Cir. 1981), the United States Court of Appeals for the Fifth Circuit came to a similar conclusion. In *Fadjo,* a state attorney conducting a criminal investigation collected some extremely sensitive private information from the plaintiff that subsequently was disclosed to the general public. Evaluating the two claims asserted in the complaint in that case, the court held:

> Fadjo clearly states a claim under the confidentiality branch of the privacy right. He does not claim that the state lacked authority to obtain personal information from him while pursuing a criminal investigation. However, even if the information was properly obtained, the state may have invaded Fadjo's privacy in revealing it [to the public]. Alternatively, although the state could compel Fadjo's testimony it could delve into his privacy only in pursuit of aims recognized as legitimate and proper. Implicit in both formulations of the complaint is the allegation that no legitimate state purpose existed sufficient to outweigh the invasion into Fadjo's privacy.

Fadjo, 633 F.2d at 1175 (footnote omitted). Citing to the holding of the court in *Fadjo* that "the state . . . could delve into his privacy only in pursuit of aims recognized as legitimate and proper," this Court wrote, "[the right to confidentiality] is implicated when government shares private information or when government collects private information in the absence of any legitimate state interest for such collection." Memorandum dated September 21, 1992, at 13-14.

The defendants argue alternatively that the legitimate need for collecting the information in this case supports their maintaining the records after any need for the records evaporated. But even where confidentiality laws limit access to records of private information, the government may not maintain such records of private information without directly implicating the right to confidentiality, which in turn requires some legitimate need on the part of the government for maintaining those records. Not an overwhelming need, nor a compelling need, nor even a substantial need – a rational, permissible, legitimate need. In all of the papers filed with this Court, the defendants in this case have failed to suggest a rational, permissible, legitimate need for the information contained in the Hodges' case file, and despite a thorough and independent inquiry, this Court cannot conceive of any. *See* Memorandum dated September 21, 1992, at 16-17. Accordingly, this Court rejects the defendants' argument and reaffirms its holding that the facts of this case implicate the Hodges' protected liberty interest in familial privacy.

B. Section 5-715

The defendants further argue that Md. Fam. Law Code Ann. § 5-715 does not apply to the AMF or to this case because, first, the AMF is not a central registry, and second, the AMF does not identify any person as a "suspected child abuser." This Court examined this issue thoroughly the first time, *see* Memorandum dated September 21, 1992, at 7-8, 20-24, and will not revisit the issue except to address a few of the points raised by the defendants in their present motion.

Filing a second affidavit from Linda Heisner, Director of the Office of Family and Children's Services at the Social Services Administration within MDHR, the defendants assert that her affidavits, and those filed by Katz, "deserve more weight" than the affidavits in support of the plaintiffs' arguments. At this stage of the proceedings, however, this Court does not "weigh the evidence [or] determine the truth," but instead, construing all of the evidence in the light most favorable to the non-moving party, asks "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 252 (1986).

This Court closely examined the statements contained in the Heisner and Katz affidavits. In her first affidavit, Heisner asserted that "no central registries exist today, nor have they since 1986." However, applicable Maryland law and regulations belie that conclusion. In another part of her affidavit, Heisner attested:

> The AMF system contains listings of services provided to families. The services are listed in code. The family's service data is entered along with the names of all persons residing in the recipient's household. Even in cases where the services received were child protective services,

> the system does not identify anyone as a suspected abuser. This is true even in cases where abuse is found to be indicated and a person has been adjudicated a child abuser.

As noted in the Memorandum dated September 21, 1992, although the AMF does not explicitly label any of the case associates as a "Suspected Child Abuser," the applicable regulations assign that label indirectly. CCDSS provides CPS services only in cases of suspected child abuse, COMAR 07.02.07.03A; thus, every case of CPS services is a case of suspected child abuse. "Child abuse" is defined as physical injury or sexual molestation inflicted on a child either by a parent or by a guardian. COMAR 07.02.07.02B(3); thus, every case of CPS services involves suspicions that a parent or guardian has physically injured or sexually molested a child. Where, as in this case, the AMF displays a record of indicated sexual child abuse and lists only the parents, one cannot help but conclude that one or both of the parents is a suspected child abuser, even in the absence of an explicit label. Moreover, to the extent that one considers the AMF to include the "hard copy" case files, documents in those files titled "Report of Suspected Child Abuse" leave no doubt about the nature of the investigation in this case. In short, taking the statements in Heisner's affidavit as true, those statements do not raise a genuine issue of material fact regarding whether the AMF is a central registry under Maryland law (it is) or whether it identifies any persons as suspected child abusers (it does).

An examination of the statements in the affidavit filed by Katz reveals similarly true statements that fail to raise any genuine issues of material fact. For example, Katz makes the statement:

> It would be highly inappropriate on the part of anyone using only the AMF to assume that either David R. Hodge or Marsha A. Hodge, or both, were suspected of committing physical or sexual abuse on Joseph E. Hodge.

Of course, such an assumption would be inappropriate because there was no abuse whatsoever in the Hodge case. Katz does *not* attest that no person ever has made such an inappropriate assumption, however. Katz also does not explain how to interpret an AMF display of a record of indicated physical abuse with only one case associate. In such a case, where the investigator has discovered credible, specific, and unrefuted evidence showing that physical abuse was committed by a caretaker through cruel or inhumane treatment or by a malicious act, COMAR 07.02.07.08B(1), one *can* conclude that the case associate at least is suspected of child abuse.

Finally, Katz attests:

> The Plaintiffs' pleadings assume that anyone whose name appears on the Automated Master File in a Child Protective Services' case is *de facto* a suspect in a child abuse or neglect investigation. This is totally incorrect. The Automated Master File system does not list, nor is it intended to list, suspected or confirmed child abusers or neglectors. It is impossible using an AMF printout by itself to draw a conclusion as to who the suspected child abuser or neglector, if any, might have been. In fact, in some cases, such as the Hodge case, the suspected abuser is not known.

As noted above, however, and at the risk of repetition, every case of CPS services is a case of suspected child abuse, and therefore every case of CPS services involves suspicion of abuse by a parent or guardian; assertions to the contrary cannot be credited. Accordingly, to the extent that the AMF contains the names of individuals other than the parents or guardians of a child, the AMF contains names of individuals who are not suspected of child abuse, because only a parent or guardian can commit that offense. As also noted above, however, although the display on the AMF does not explicitly label any case associates as "suspected child abusers," in many cases the display provides that information indirectly, and the hard copy case file dispels all uncertainty. In light of the undisputed facts and the inescapable conclusions of law that follow from them, it simply is not impossible in every case to determine, even from the AMF display alone, the identity of a suspected child abuser.

C. Qualified Immunity

The defendants also argue that they enjoy qualified immunity from liability in this case because the applicable law was not "clearly established." Of course, the right to familial privacy and the protections of § 5-715 were clearly established as of January 1989. This Court addressed that issue completely in the Memorandum dated September 21, 1992, and will not revisit it except to address one argument.

The defendants complain that no case cited by this Court "concerned the issue of whether a child protective services agency's *maintenance* of records concerning its investigation of an unsubstantiated report of child abuse violates the family's right of privacy." Memorandum in Support of Motion, at 12-13 (emphasis in original). But as noted above, it is well-established first, that a protected liberty interest in familial privacy exists and closely parallels an individual's interest in privacy protected by the Due Process Clause; second, that no agency of any kind may maintain records of private information without implicating the protected liberty interest in privacy; and third, where an agency insists on maintaining such records in the absence of any legitimate need for those records, the right of privacy is deprived.

D. Genuine Issues of Material Fact

Finally, the defendants argue that this Court failed to credit the assertions contained in the affidavits filed by Heisner and Katz. As discussed more completely above, this Court credited those affidavits but found that they raised no genuine issues of material fact to preclude a finding of liability. In light of all of the foregoing, therefore, this Court will deny the defendants' motion to alter or amend.

III. PLAINTIFFS' MOTION TO ALTER OR AMEND

In their motion, the plaintiffs seek an amendment to the Memorandum dated September 21, 1992, in order to indicate the following:

> 1. Every person whose name a local Department of Social Services ("DSS") intends to enter

into the Automated Master File ("AMF") is entitled to notice and hearing under Maryland Code, Family Law, § 5-715.

2. The notice required by Maryland Code, Family Law, § 5-715(b) must inform the person subject thereto

(a) that he or she is suspected of child abuse or child neglect;

(b) that the local DSS intends to enter the person's name into the AMF under Maryland Code, Family Law, § 5-715(d)(2, 3) if the person (i) fails to respond to the notice within fifteen (15) days thereof or (ii) unsuccessfully appeals the entry of his or her name into the AMF under procedures established by the Maryland Department of Human Resources ("MDHR");

(c) of the specific MDHR regulations governing an appeal of the entry of the person's name into the AMF;

(d) of enough of the evidence in the local DSS's possession fairly to apprise the person of the specific charges against him or her, and to enable the person intelligently to decide whether to appeal entry of his or her name into the AMF.

3. If, within fifteen (15) days, the person so notified requests an administrative hearing, the local DSS must supply him or her with the complete AMF and "hard-copy" file of the investigation, suitably redacted to protect the identity of the "reporter" or any other person whose life or safety is likely to be endangered by disclosing the information. The file must be supplied sufficiently in advance of the hearing to allow the

> person a reasonable time to obtain witnesses, assemble documentary evidence, and otherwise adequately prepare his or her appeal.
>
> 4. At the administrative hearing, the local DSS must allow the person, through an attorney or *pro se,* to examine and crossexamine witnesses, to present documentary evidence, and to make argument orally and in written memoranda, subject to appropriate rules of procedure and evidence.
>
> 5. The complete proceedings of the hearing, including all testimony, evidence, and argument, must thereafter be permanently included in the local DSS's case-file.
>
> 6. If the person's evidence shows that the local DSS's case-file contains errors or omissions of material fact, the DSS must correct those errors or omissions.
>
> 7. If the person's evidence indicates that the local DSS's case-file may contain errors or omissions of material fact, but the DSS contests the validity of the person's showing, the DSS must state its reasons on the record, with sufficient specificity to enable the person, if he or she chooses, to challenge those reasons on judicial review of the administrative appeal.

Motion, at 1-4. Concluding that the Hodges lack standing to assert these new claims, which go far beyond even those claims that this Court rejected in the Memorandum dated September 21, 1992, this Court will deny the motion.

Plaintiffs in federal court must satisfy the threshold requirement imposed by Article III of the United States

Constitution by alleging a case or controversy, U.S. Const. art. III, § 2, cl. 1, for this Court has no power to issue advisory opinions, *United States v. Fruehauf,* 365 U.S. 146, 157 (1961), and only may decide "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen,* 392 U.S. 83, 95 (1968).

In this case, the plaintiffs asserted claims under 42 U.S.C. § 1983 in connection with the inclusion of a record of their case on the AMF despite uncontested medical evidence that precluded any possibility of child abuse. Further, the plaintiffs asserted that the inclusion of their names on the AMF occurred without notice and a hearing as required by § 5-715. These claims raised controversies between the parties concerning, *inter alia,* the existence and scope of the right to familial privacy under the Due Process Clause, and the applicability of § 5-715 to the defendants' actions.

In their motion to alter or amend, the plaintiffs seek relief essentially in the form of a declaratory judgment that would "indicate" the proper form of notice and the proper way to conduct a hearing when, in the future, the defendants seek to place more records of other cases of suspected child abuse on the AMF. However, under the Declaratory Judgment Act, 28 U.S.C. § 2201(a), this Court may not make such an indication in the absence of a constitutional controversy. *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 239-40 (1937). Nothing about this case requires a decision as to the proper form of notice or the proper conduct of a hearing under § 5-715, in light of the undisputed fact that the defendants denied the plaintiffs notice and a hearing of *any* kind.

Another consideration prevents this Court from granting the relief that the plaintiffs seek. The "individual States have broad latitude in experimenting with possible solutions to problems of vital local concern." *Whalen*, 429 U.S. at 597. The notice and hearing provisions of § 5-715 and the supporting regulations promulgated by the MDHR represent "a considered attempt to deal with such a problem" – namely, child abuse. Although this Court stands ready to interpret those statutes and regulations when necessary, this Court is ill-equipped to step into the shoes of the Maryland General Assembly or the MDHR and pass new regulations to deal with the troubling problem of child abuse in Maryland.

IV. CONCLUSION

Having considered the motions to alter or amend judgment, this Court remains unpersuaded, and will deny both of those motions. This Court will execute an Order on this date in accordance with the foregoing Memorandum.

/s/ Herbert F. Murray
Senior United
States District Judge

Dated: January 22nd, 1993.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

DAVID R. HODGE, ET AL.	:	
V.	:	CIVIL NO.
	:	HM-92-155
CARROLL COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL.	:	
	:	
	:	

ORDER

In accordance with the Memorandum issued on this date in the above-captioned case, it is this 22nd day of January, 1993, by the United States District Court for the District of Maryland,

ORDERED:

(1) that the motion of the defendants, Carroll County Department of Social Services, M. Alexander Jones, Alan Katz, and Carolyn Colvin, to alter or amend judgment be, and the same hereby is, *Denied;*

(2) that the motion of the plaintiffs, David R. Hodge and Marsha A. Hodge, individually and on behalf of their son, Joseph E. Hodge, to alter or amend judgment be and the same hereby is, *Denied;* and

(3) that the Clerk of the Court shall mail a copy of this Order with the accompanying Memorandum to all of the parties.

/s/ Herbert F. Murray
Senior United
States District Judge

United States Constitution, Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42, United States Code, Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. * * *

Maryland Code, Family Law

§ 5-714. Child abuse or neglect central registry – In general.

(a) *Maintenance.* – The Social Services Administration and each local department may maintain a central registry of cases reported under this subtitle.

(b) *Source of information.* – The respective local departments throughout this State shall provide the information for the central registry.

(c) *Availability of information.* – The information in the central registry shall be at the disposal of:

(1) the protective services staff of the Social Services Administration;

(2) the protective services staffs of local departments who are investigating a report of suspected abuse or neglect; and

(3) law enforcement personnel who are investigating a report of suspected abuse or neglect. (1987, ch. 635, § 2.)

§ 5-715. Same – Protection of rights of person suspected of abuse or neglect.

(a) *Rules and regulations.* – The Secretary of Human Resources shall adopt regulations necessary to protect the rights of persons suspected of abuse or neglect.

(b) *Notice of entry of name in central registry.* – Before the name of a person who is suspected of abuse or neglect is entered in the central registry, the person shall be given notice.

(c) *Hearing to appeal entry of name in central registry required; exception.* – (1) Except as provided in paragraph (3) of this subsection, on request by a person suspected of abuse or neglect, the Department shall hold an administrative hearing for the purpose of allowing the person to appeal the entry of the person's name in the central registry.

(2) The hearing shall be held in the county in which the person suspected of abuse or neglect resides.

(3) The name of a person adjudicated a child abuser may be entered in the central registry without an opportunity for a hearing under this subsection.

(d) *Requirements for entry of name in central registry.* – The Department may not enter the name of a person in the central registry unless the person has:

(1) been adjudicated a child abuser;

(2) unsuccessfully appealed the entry of the person's name in the central registry under procedures established by the Department and this section; or

(3) failed to respond within 15 days to notice by the Department of the Department's intent to enter the person's name in the central registry.

(e) *Removal of name from central registry.* – On request by the person, the Department shall remove the name of a person suspected of abuse or neglect from the central registry if no entry has been made for that person for 7 years before the date of the request. (1987, ch. 635, § 2.)

§ 5-701. Definitions.

(a) *In general.* – In this subtitle the following words have the meanings indicated.

(b) *Abuse.* – (1) "Abuse" means:

(i) the physical injury of a child by any parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child, or by any household or family member, under circumstances that indicate that the child's health or welfare is significantly harmed or at risk of being significantly harmed; or

(ii) sexual abuse of a child, whether physical injuries are sustained or not.

(2) "Abuse" does not include, for that reason alone, providing a child with nonmedical religious remedial care and treatment recognized by State law.

* * *

(p) *Sexual abuse.* – (1) "Sexual abuse" means any act that involves sexual molestation or exploitation of a child by a parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child, or by any household or family member.

(2) "Sexual abuse" include:

(i) incest, rape, or sexual offense in any degree;

(ii) sodomy; and

(iii) unnatural or perverted sexual practices. (1987, ch. 635, § 2; 1989, ch. 395; ch. 730, §§ 1, 2.)

§ 5-702. Legislative policy.

The purpose of this subtitle is to protect children who have been the subject of abuse or neglect by:

(1) mandating the reporting of any suspected abuse or neglect;

(2) giving immunity to any individual who reports, in good faith, a suspected incident of abuse or neglect;

(3) requiring prompt investigation of each reported suspected incident of abuse or neglect;

(4) causing immediate, cooperative efforts by the responsible agencies on behalf of children who have been the subject of reports of abuse or neglect; and

(5) requiring each local department to give the appropriate service in the best interest of the abused or neglected child. (1987, ch. 635, § 2.)

§ 5-707. Reports and records. [In force in 1989]

(a) *Confidentiality.* – Subject to federal and State law, the Administration shall provide by regulation:

(1) procedures for protecting the confidentiality of reports and records made in accordance with this subtitle; and

(2) conditions under which information may be released.

(b) *Expungement.* – The local department shall expunge a report of suspected abuse or neglect 5 years after the date of the report if:

(1) the investigation under § 5-706 of this subtitle concludes that the report is unsubstantiated; and

(2) no further reports of abuse or neglect are received during the 5 years (1987, ch. 635, § 2.)

§ 5-707. Reports and records. [As amended in 1991]

(a) *Confidentiality.* – Subject to federal and State law, the Administration shall provide by regulation:

(1) procedures for protecting the confidentiality of reports and records made in accordance with this subtitle; and

(2) conditions under which information may be released.

(b) *Expungement.* – The local department shall expunge a report of suspected abuse or neglect and all assessments and investigative findings:

(1) within 5 years after the date of referral if the investigation under § 5-706 of this subtitle concludes that the report is unsubstantiated, and no further reports of abuse or neglect are received during the 5 years; and

(2) within 120 days after the date of referral if the report is ruled out, and no further reports of abuse or neglect are received during the 120 days. (1987, ch. 635, § 2; 1991, ch. 461.)

Maryland Code, State Government

§ 10-602. Limitation on records.

The State, a political subdivision, or a unit of the State or of a political subdivision may keep only the information about a person that:

(1) is needed by the State, the political subdivision, or the unit to accomplish a governmental purpose that is authorized or required to be accomplished under:

(i) a statute or other legislative mandate;

(ii) an executive order of the Governor;

(iii) an executive order of the chief executive of a local jurisdiction; or

(iv) a judicial rule; and

(2) is relevant to accomplishment of the purpose. (An. Code 1957, art. 76A, § 1A; 1984, ch. 284, § 1; ch. 285, § 8.)

Maryland Code, Article 88A

§ 6. Misuse of public assistance lists and records.

(a) *In general.* – Except in accordance with a court order or to an authorized officer or employee of the State, or the United States, or a fiduciary institution having a right thereto in an official capacity, and as necessary to discharge responsibilities to administer public assistance, medical assistance, or social services programs, it shall be unlawful for any person or persons to divulge or make known in any manner any information concerning any applicant for or recipient of social services, child welfare services, cash assistance, food stamps, or medical assistance, directly or indirectly derived from the records, papers, files, investigations or communications of the State, county or city, or subdivisions or agencies thereof, or acquired in the course of the performance of official duties.

(b) *Child abuse or neglect.* – Except as otherwise provided in Title 5, Subtitle 7 of the Family Law Article, all records and reports concerning child abuse or neglect are confidential, and their unauthorized disclosure is a criminal offense subject to the penalty set out in subsection (e) of this section. Information contained in reports or records concerning child abuse or neglect may be disclosed only:

(1) Under a court order;

(2) To personnel of local or State departments of social services, law enforcement personnel, and members of multidisciplinary case consultation teams, who are investigating a report of known or suspected child abuse

or neglect or who are providing services to a child or family that is the subject of the report;

(3) To local or State officials responsible for the administration of the child protective service as necessary to carry out their official functions;

(4) To a person who is the alleged child abuser or the person who is suspected of child neglect if that person is responsible for the child's welfare and provisions are made for the protection of the identity of the reporter or any other person whose life or safety is likely to be endangered by disclosing the information;

(5) To a licensed practitioner who, or an agency, institution, or program which is providing treatment or care to a child who is the subject of a report of child abuse or neglect; or

(6) To a parent or other person who has permanent or temporary care and custody of a child, if provisions are made for the protection of the identity of the reporter or any other person whose life or safety is likely to be endangered by disclosing the information.

(c) *Statistics: financial records.* – Nothing in this section shall be construed to prohibit:

(1) The publication, for administrative or research purposes, of statistics or other data so classified as to prevent the identification of particular persons or cases;

(2) The Department of Human Resources from obtaining an individual's financial records from a fiduciary institution in the course of verifying the individual's eligibility for public assistance; or

(3) Disclosures as permitted by § 1-303 of the Financial Institutions Article of the Code.

(d) *Regulations.* – The Social Services Administration shall issue regulations governing access to and use of confidential information which is in the possession of the Administration or local departments of social services.

(e) *Penalty.* – Any offense against the provisions of this section shall be a misdemeanor and shall be punishable by a fine not exceeding five hundred dollars ($500) or imprisonment for not exceeding ninety days, or both, in the discretion of the court.

Code of Maryland Regulations

Title 07 Department of Human Resources
Subtitle 02 Social Services Administration
Chapter 07 Protective Services for Neglected and Abused Children

.02 Definitions.

A. The following terms have the meanings indicated.

B. Terms Defined.

(1) "Central registry" means a registry of all reported cases of suspected child abuse and neglect maintained in the Social Services Administration.

* * *

(3) "Child abuse" means:

(a) Physical injury, not necessarily visible, sustained by a child as a result of cruel or inhumane treatment or as a result of a malicious act or acts, under circumstances that indicate that the child's health or welfare is harmed or threatened by it, by a parent, adoptive parent, household or family member, or custodian, including any stepparent, foster parent, or guardian;

(b) Any sexual abuse, meaning an act or acts involving sexual molestation or exploitation, whether physical injuries are sustained or not, by a parent, adoptive parent, household or family member, or custodian, including any stepparent, foster parent, or guardian.

.08 Disposition of Investigation of Suspected Child Abuse and Neglect.

A. Based on its investigation, the local department shall determine whether a report of suspected child abuse or neglect is found to be "indicated" or "unsubstantiated".

B. Indicated Child Abuse.

(1) An "indicated" report of child abuse means one in which there is credible and specific evidence, which has not been satisfactorily refuted, that:

(a) Physical injury resulted from cruel or inhumane treatment or a malicious act by a caretaker or household or family member; or

(b) Sexual abuse of a child occurred and was committed by a caretaker or household or family member; or

(c) The nature, extent and location of injury make cruel or inhumane treatment or a malicious act the likely cause; or

(d) There are physical or behavioral indications that a child has been sexually abused, including but not limited to, genital trauma, pregnancy, sexually transmitted diseases, and patterns of behavior typically associated with sexual abuse.

(2) The determination that abuse is "indicated" does not require a court conviction for the crime of child abuse or the existence of proof sufficient to obtain such a conviction. In making this determination, the local department shall consider whether:

(a) Explanations of the incident under investigation are inconsistent over time, or do not match the developmental age and capabilities of the child; or

(b) There is a history of prior unexplained injuries in the household or family which may indicate patterns of domestic violence.

C. Unsubstantiated Child Abuse. An "unsubstantiated" report of child abuse is one which does not meet the criteria established for an "indicated" finding. In choosing this disposition, the worker shall document the extent to which any of the following factors apply to the situation:

(1) There is no current injury;

(2) There is no credible account by the suspected victim or a witness;

(3) There is no indication of past injury or sexual abuse;

(4) There is credible evidence that injuries have been accidentally caused, or did not result from a cruel, inhumane or malicious act; or

(5) It is not possible to complete the investigation due to an inability to gain access to the child or to obtain relevant facts regarding the incident.

.14 Child Abuse and Neglect Central Registry.

A. Reporting Information to Central Registry.

(1) The Social Services Administration and each local department may maintain a Central Registry of all reported cases of suspected child abuse and neglect.

(2) The Social Services Administration may require local departments to forward to the Central Registry the findings and disposition of each case of suspected child abuse or neglect investigated by the local department.

.18 Confidentiality.

A. As delineated in Article 88A, § 6(b), Annotated Code of Maryland, information contained in reports or records concerning child abuse or neglect may be disclosed only:

(1) Under a court order;

(2) To personnel of local or State departments of social services, law enforcement personnel, and members of multi-disciplinary case consultation teams, who are investigating a report of known or suspected child abuse or neglect or who are providing services to a child or family that is the subject of the report;

(3) To local or State officials responsible for the administration of the child protective service as necessary to carry out their official functions;

(4) To a person who is the alleged child abuser or the person who is suspected of child neglect if that

person is responsible for the child's welfare and provisions are made for the protection of the identity of the reporter or any other person whose life or safety is likely to be endangered by disclosing the information;

(5) To a licensed practitioner who, or an agency, institution, or program which, is providing treatment or care to a child who is the subject of a report of child abuse or neglect; or

(6) To a parent or other person who has permanent or temporary care and custody of a child, if provisions are made for the protection of the identity of the reporter or any other person whose life or safety is likely to be endangered by disclosing the information.